DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1117
Title: Officer Vance Plumhoff, et al., Petitioners
v.
Whitne Rickard, a Minor Child, Individually, and as Surviving Daughter of Donald Rickard, Deceased, By and Through Her Mother Samantha Rickard, as Parent and Next Friend

Docketed: March 14, 2013
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (11-5266)
Decision Date: November 14, 2012
Rehearing Denied: December 13, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 12 2013	Petition for a writ of certiorari filed. (Response due April 15, 2013)
Apr 30 2013	DISTRIBUTED for Conference of May 16, 2013.
May 8 2013	Response Requested . (Due June 7, 2013)
Jun 7 2013	Brief of respondent Whitne Rickard, a Minor Child, Individually, and as Surviving Daughter of Donald Rickard, Deceased, By and Through Her Mother Samantha Rickard, as Parent and Next Friend in opposition filed.
Jun 19 2013	DISTRIBUTED for Conference of September 30, 2013.
Aug 13 2013	Record Requested .
Aug 14 2013	Record received from the Court of Appeals for the Sixth Circuit
Aug 21 2013	DISTRIBUTED for Conference of September 30, 2013.
Aug 21 2013	Reply of petitioners Officer Vance Plumhoff, et al. filed. (Distributed)
Aug 22 2013	Record Requested .
Sep 27 2013	Record received from the United States District Court Western District of Tennessee (3 DVDs).
Oct 2 2013	DISTRIBUTED for Conference of October 18, 2013.
Oct 28 2013	DISTRIBUTED for Conference of November 1, 2013.
Nov 4 2013	DISTRIBUTED for Conference of November 8, 2013.
Nov 12 2013	DISTRIBUTED for Conference of November 15, 2013.
Nov 15 2013	Petition GRANTED.
Nov 25 2013	SET FOR ARGUMENT ON Tuesday, March 4, 2014
Dec 17 2013	Record received from U.S.C.A. 6th Circuit, the record is electronic.
Dec 30 2013	Joint appendix filed. (Statement of costs filed)

Dec 30 2013	Brief of petitioners Officer Vance Plumhoff, et al. filed.
Dec 31 2013	Record received from U.S.D.C. Western District of Tennessee Western Division. (1 Box)
Jan 6 2014	Brief amicus curiae of the United States filed.
Jan 6 2014	Brief amici curiae of Ohio and 21 Other States filed.
Jan 6 2014	Brief amici curiae of National Conference of State Legislatures, et al. filed. (Distributed)
Jan 7 2014	Record received from U.S.D.C. Western District of Tennessee (Memphis)
Jan 9 2014	CIRCULATED
Jan 29 2014	Brief of respondent Whitne Rickard, a Minor Child, Individually, and as Surviving Daughter of Donald Rickard, Deceased, By and Through Her Mother Samantha Rickard, as Parent and Next Friend filed. (Distributed)
Jan 31 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 4 2014	Brief amicus curiae of Professor Jonathan R. Nash filed. (Distributed).
Feb 5 2014	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Feb 5 2014	Brief amici curiae of National Police Accountability Project, et al. filed. (Distributed)
Feb 20 2014	Reply of petitioners Officer Vance Plumhoff, et al. filed. (Distributed)
Feb 21 2014	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 4 2014	Argued. For petitioners: Michael Mosley, North Little Rock, Ark.; and John F. Bash, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Gary K. Smith, Memphis, Tenn.

PETITION FOR WRIT OF CERTIORARI

12-1117

No. _____

In The
Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a civil case against police officers for excessive force, a court must grant qualified immunity unless the use of force was prohibited by clearly established law. Here, the Sixth Circuit denied qualified immunity for force used in 2004 to end a vehicular pursuit that is similar to the force ruled permissible in *Scott v. Harris*, 550 U.S. 372 (2007). The Sixth Circuit denied qualified immunity by distinguishing *Scott* "in the details" from the force used three years *earlier* in this case. (Pet. App. at 8-9.) The Sixth Circuit applied a similar analysis in *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011), where it also distinguished *Scott* to deny qualified immunity for pre-2007 conduct. As Judge McKeague noted in his extended dissent, the Sixth Circuit stands alone in this analysis. *Id.* at 504-11 (McKeague, J., dissenting). Petitioners believe this Court has an opportunity to correct the errors in the Sixth Circuit's qualified immunity analysis by agreeing to hear their case. The specific questions presented are as follows:

1. Whether the Sixth Circuit wrongly denied qualified immunity to Petitioners by analyzing whether the force used in 2004 was distinguishable from factually similar force ruled permissible three years later in *Scott v. Harris*, 550 U.S. 372 (2007). Stated otherwise, the question presented is whether, for qualified immunity purposes, the Sixth Circuit erred in analyzing whether the force was *supported* by subsequent case decisions as opposed to *prohibited* by clearly established law at the time the force was used.

QUESTIONS PRESENTED – Continued

2. Whether the Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law when, under Respondent's own facts, the suspect led police officers on a high-speed pursuit that began in Arkansas and ended in Tennessee, the suspect weaved through traffic on an interstate at a high rate of speed and made contact with the police vehicles twice, and the suspect used his vehicle in a final attempt to escape after he was surrounded by police officers, nearly hitting at least one police officer in the process.

PARTIES TO THE PROCEEDINGS

Petitioners are the following members of the West Memphis Police Department: Officer Vance Plumhoff; Officer John Bryan Gardner; Officer Tony Galtelli; Officer Lance Ellis; Officer Jimmy Evans; and Officer Joseph Forthman.

Respondent is Whitne Rickard, a minor and surviving daughter of Donald Rickard, deceased. The lawsuit was filed on her behalf by Samantha Rickard, as parent and next friend.

No corporations are parties to the proceedings.

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OPINIONS AND JUDGMENTS BELOW

On January 20, 2011, the United States District Court for the Western District of Tennessee entered an order granting in part and denying in part Petitioners' motion for summary judgment. The district court's order is available on Westlaw at *Estate of Allen v. City of West Memphis*, Nos. 05-2489 and 05-2585, 2011 WL 197426 (W.D. Tenn. Jan. 20, 2011). In addition, the district court's order is reproduced in the appendix to this petition. (Pet. App. at 16-62.)

On October 9, 2012, the United States Court of Appeals for the Sixth Circuit issued an opinion affirming the district court's order. On November 14, 2012, the Sixth Circuit vacated its October 9, 2012 opinion and issued a substitute opinion that also affirmed the district court's order. The Sixth Circuit's November 14, 2012 opinion is available on Westlaw at *Estate of Allen v. City of West Memphis*, No. 11-5266, 2012 WL 6634306 (6th Cir. Nov. 14, 2012). The Sixth Circuit denied rehearing en banc on December 13, 2012. Both the November 14, 2012 opinion that is the subject of this petition and the order denying rehearing en banc are reproduced in the appendix. (Pet. App. at 1-15 and 63-64.)[1]

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[1] The Sixth Circuit's opinion of October 9, 2012 is noted on Westlaw as having been superseded by the November 14, 2012 opinion. *Estate of Allen v. City of West Memphis*, No. 11-5266, 2012 WL 6603083 (6th Cir. Oct. 9, 2012). Petitioners do not cite herein to the October 9, 2012 opinion that was superseded by the November 14, 2012 opinion and are informed that it need

(Continued on following page)

STATEMENT OF JURISDICTION

The Sixth Circuit had appellate jurisdiction over Petitioners' initial appeal because the district court's January 20, 2011 order was a final decision within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985).

Following the Sixth Circuit's issuance of its November 14, 2012 opinion, Petitioners filed a timely request for rehearing en banc, which the Sixth Circuit denied on December 13, 2012. (Pet. App. at 1-15 and 63-64.) This petition is timely because it is being filed within 90 days after the Sixth Circuit's denial of Petitioners' request for rehearing en banc. SUP. CT. R. 13(1) and (3).

The Court has jurisdiction to consider this appeal under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Respondent seeks damages pursuant to 42 U.S.C. § 1983 for an alleged violation of the decedent's rights

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not be included in the appendix. The opinion can be obtained from the Sixth Circuit, or will be provided by Petitioners, if desired by the Court nevertheless.

under the Fourth Amendment to the United States Constitution.

The Fourth Amendment provides in pertinent part that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

Section 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A. Introduction.

Respondent's decedent was killed when he lost control of his vehicle after being shot by police officers following a high-speed pursuit that began at a gas station next to an interstate highway entrance in

West Memphis, Arkansas, and ended on the streets of Memphis, Tennessee. The Sixth Circuit affirmed the denial of summary judgment on qualified immunity grounds because it could not "conclude that the officers' conduct was reasonable as a matter of law." (Pet. App. at 10.) In so finding, the circuit court acknowledged "the similarity of the facts here to the facts of *Scott* [*v. Harris*, 550 U.S. 372 (2007)]," where this Court found the officer had not violated the Fourth Amendment when he "intentionally rammed into the back of the fleeing car causing it to leave the road and crash, resulting in crippling injuries to the driver." (Pet. App. at 8.) The Sixth Circuit acknowledged that a very close analysis was required to distinguish *Scott*: "the devil is in the details, and it is those details that cause us to conclude that *Scott* is distinguishable." (*Id.* at 8-9.)

Petitioners believe the Sixth Circuit committed clear error in its qualified immunity analysis in two main respects: (1) it denied qualified immunity based solely on a determination of whether the force was reasonable under the Fourth Amendment as a matter of law; and (2) it relied on distinctions "in the details" from the post-incident decision in *Scott* to deny qualified immunity to Petitioners based on the absence of clearly established law *supporting* the force they applied. Petitioners note that these errors are not unique to this case but are part of the Sixth Circuit's precedent. On the first point, and contrary to this Court's teachings in *Saucier v. Katz*, 533 U.S. 194 (2001), as discussed below, the Sixth Circuit has held

that "qualified immunity in cases involving deadly force is difficult to determine on summary judgment because liability turns on the Fourth Amendment's reasonableness test." *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 903 (6th Cir. 1998). The Sixth Circuit has relied on this reasoning to deny qualified immunity on other occasions as well. *See, e.g.*, *Rodriguez v. Passinault*, 637 F.3d 675, 689 (6th Cir. 2011); *Murray-Ruhl v. Passinault*, 246 F. App'x 338, 343 (6th Cir. 2007); *Smith v. Kim*, 70 F. App'x 818, 819 (6th Cir. 2003). Petitioners request that this repeated error in the Sixth Circuit's precedent be addressed in their case.

On the second point as well, Sixth Circuit precedent has distinguished *Scott* to deny qualified immunity in a pursuit case that also predated *Scott*. In *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011), the majority opinion reasoned that the force was prohibited based on "general statements" of law that preceded *Scott* and because "[t]he chase here was a sleeper by comparison [to *Scott*]." *Id.* at 503. In a lengthy dissent, Judge McKeague took the majority to task for its reliance on distinctions from *Scott* and its generalized statements of law. He wrote: "I respectfully dissent because I think the majority has significantly downplayed the level of risk that [the suspect] posed to the public, and defined clearly-established law at too high a level of generality." *Id.* at 504. Petitioners have the identical objection to the Sixth Circuit's reasoning in this case that Judge McKeague articulated in *Walker*.

Petitioners believe the conceptual flaws in the Sixth Circuit's case law conflict directly with this Court's precedent as well as cases from the sister circuits. This is particularly troubling to Petitioners because qualified immunity is immunity from suit and not just damages such that "it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526; *see also Hunter v. Bryant*, 504 U.S. 224, 227 (1991) (directing lower courts to resolve qualified immunity questions "at the earliest stage possible of the litigation"). Here, Petitioners are being forced to trial without the Sixth Circuit having ever examined whether they violated clearly established law.

On occasions where there has been clear error, this Court has reversed the circuit court's judgment summarily, as it did in *Brosseau v. Hagen*, 543 U.S. 194 (2004) (per curiam), which is discussed below. Petitioners recognize that summary reversal on a petition is unusual but believe they should not be exposed to civil liability under clear precedent of this Court. Alternatively, Petitioners request that this Court grant their petition to allow for plenary consideration of their qualified immunity defense.

B. Facts and procedural history.

The Sixth Circuit's ruling was based on facts that Petitioners conceded for purposes of the summary judgment analysis. In that respect, the lower court found that around midnight on July 18, 2004, Officer

Joseph Forthman of the West Memphis Police Department stopped a white Honda Accord because it had only one operating headlight. (Pet. App. at 3.) Instead of complying with Officer Forthman's request to step out of the vehicle, the driver (who was later identified as Donald Rickard) fled away in the Honda. (*Id.*) Officer Forthman commenced a vehicular pursuit and radioed for assistance. (*Id.*) He was joined by officers in four other vehicles in pursuing Rickard who turned onto I-40 heading east from Arkansas into Tennessee. (*Id.*) One officer stated on the police radio that Rickard tried to ram him, and another officer stated that Rickard was trying to ram another vehicle. (*Id.* at 3-4.)

Once he crossed the Mississippi River into Memphis, Rickard left the freeway and sped recklessly through city streets. As found by the lower court, Rickard continued to use his vehicle as a means of escape:

> "As the Rickard vehicle approached Jackson Avenue, it made a quick right turn onto Jackson Avenue and contact occurred between the Rickard vehicle and a police vehicle. The contact caused the Rickard vehicle to spin around in a parking lot at the intersection of Danny Thomas Boulevard and Jackson Avenue. Separate Defendants assert that the Rickard vehicle then turned directly toward Plumhoff's vehicle and had a head-on collision with it. Plaintiffs dispute these statements and aver that the Rickard vehicle was still moving forward from the

momentum caused by the spinout after contact with Evans' vehicle and that this momentum caused the collision with Plumhoff's vehicle.

At or near this stage of events, the other officers formed a semicircle around the Rickard vehicle, attempting to use the building in the parking lot to prevent the vehicle from fleeing. Because of the building and the location of the police cars, the only unobstructed way for Rickard to escape was to back up. Rickard reversed in an attempt to escape, and as he did so Evans and Plumhoff exited their vehicles and approached the Rickard vehicle. Evans tried to get into the vehicle by pounding on the passenger-side window with his gun in his hand. Gardner and other officers also approached the vehicle. At this point, the wheels of the Rickard vehicle were spinning, and the vehicle made contact with Gardner's vehicle. Separate Defendants assert that the vehicle's engine was "revving," but Plaintiffs dispute this and state that the vehicle was rocking back and forth, and it is unclear whether the engine noise in conjunction with this rocking motion should be characterized as revving the engine.

Plumhoff fired three shots into the Rickard vehicle. The video from unit # 279 shows that Plumhoff was near the passenger-side of the vehicle when he fired those shots. The Rickard vehicle then reversed in a 180 degree arc onto Jackson Avenue heading east. As the Rickard vehicle reversed, Galtelli

> exited his vehicle and ran to join the other officers who were chasing the vehicle as it maneuvered onto Jackson Avenue. Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle. Gardner then fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle. Gardner fired all ten shots while the vehicle was moving forward (i.e., away from the officers). Galtelli also fired two shots at the vehicle. As the officers were shooting, Rickard was fleeing down Jackson Avenue. Rickard then lost control of the vehicle, and the Rickard vehicle crashed into a building at the corner of Jackson Avenue and Manassas Street. Both Rickard and Allen were killed."

(Pet. App. at 4-6 (quoting Pet. App. at 22-24).)[2]

Based on this recitation of facts, the Sixth Circuit found summary judgment was inappropriate because "we cannot conclude that the officers' conduct was

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[2] Videotaped evidence from the police cruisers that confirms these facts are in the record of the case. Petitioners invite the Court to view the videotapes that can be forwarded by the Sixth Circuit or supplied by Petitioners. If reviewed by the Court, Officer Forthman's videotape shows the fleeing suspect weaving around vehicles and culminates with shots fired at the vehicle as the suspect tries to evade capture, shown from minute markers 9:12 to 16:51. Officer Ellis' videotape shows the suspect's driving from minute markers 13:45 to 18:30, and Officer Galtelli's videotape depicts the driving from minute markers 00:45 to 02:31.

reasonable as a matter of law." (Pet. App. at 10.)[3] In so concluding, the panel relied primarily on distinctions it found with the facts of *Scott* where "[t]he fleeing motorist . . . was still fleeing at very high speeds when he was rammed from behind." (*Id.* at 9.) In contrast, the Sixth Circuit wrote that Petitioners used firearms when the suspect's vehicle "was essentially stopped and surrounded by police officers and police cars although some effort to elude capture was still being made." (*Id.*)[4]

Even though *Scott* was decided three years after the events in this case, the Sixth Circuit relied on distinctions that it acknowledged were "in the details" of the subsequent decision as a basis for denying qualified immunity to Petitioners. And, instead of considering the governmental interest in ending the

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[3] The district court dismissed the constitutional claims brought on behalf of Rickard's passenger Kelly Allen based on findings that the Due Process Clause of the Fourteenth Amendment, and not the Fourth Amendment, applied and that the use of force was not shocking to the conscience to show liability under the Fourteenth Amendment pursuant to *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). (Pet. App. at 43-47.) The claims involving the passenger are not at issue in this Petition.

[4] Petitioners note that what the Sixth Circuit characterized as Rickard's "effort to elude capture" is shown on the videotapes as Rickard maneuvering his vehicle in reverse to get around the officers who were on foot and then speeding away recklessly. Officer Forthman's videotape at minute markers 16:25 to 16:30; Officer Ellis' videotape at minute markers 18:35 to 18:48; Officer Forthman's videotape from minute markers 16:30 to 16:51.

ongoing threat to the public from Rickard's dangerous propensities, the Sixth Circuit focused instead on "the degree of danger that the officers were placed in as a result of Rickard's conduct." (*Id.* at 10.)

For the reasons presented in the Argument section below, the Sixth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). Review is warranted to address these important and recurring procedural and substantive issues in the Fourth Amendment and qualified immunity contexts.

ARGUMENT

A. The Sixth Circuit erred in analyzing whether the force was supported by subsequent case law as opposed to prohibited by clearly established law at the time the force was used.

The Sixth Circuit upheld the denial of qualified immunity based on a finding that it could not deem the force used under Respondent's version of facts to be reasonable under established law. This is an inversion of the qualified immunity inquiry which is whether the use of force was *precluded* by established law. Notably, a finding of reasonableness for Fourth Amendment purposes is distinct from whether the officer violated clearly established law. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) ("The general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment is of little help in

determining whether the violative nature of particular conduct is clearly established.") The notion that reasonable use of force is synonymous with the qualified immunity analysis was rejected soundly over a decade ago in *Saucier* as follows:

> If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.
>
> The qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer could correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

533 U.S. at 205. This Court then summed up the distinction between the standards as follows:

> Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have

> violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment . . . , *Anderson* [*v. Creighton*, 483 U.S. 635 (1987),] still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis applies in excessive force cases, where in addition to the deference officers received on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.

Id. at 206.

To underscore the distinction between Fourth Amendment reasonableness and the qualified immunity analysis, *Saucier* set up what was subsequently termed a "rigid 'order of battle'" requiring lower courts to resolve whether there is evidence of a constitutional violation instead of skipping to whether the right was "clearly established." *Morse v. Frederick*, 551 U.S. 393, 430 (2007) (Alito, J., concurring). In *Pearson v. Callahan*, this Court relaxed that requirement by holding that the courts have discretion, in certain circumstances, to find that an alleged constitutional right was not clearly established without having to resolve first whether there was, in fact, a constitutional violation. 555 U.S. 223, 230 (2009) ("[T]here will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all.").

Although *Pearson* allowed lower courts discretion to determine whether there was a constitutional violation, it did not remove the requirement that courts determine whether the right was clearly established. *Id.* at 232 ("[I]f the plaintiff has satisfied [the] first step, the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct."). Yet that imperative is exactly what the Sixth Circuit did not do in this case: it found the evidence could support an unreasonable use of force and *on that basis* stripped Petitioners of qualified immunity. This reasoning runs directly afoul of this Court's clear direction in *Saucier* that courts must *not* conflate reasonableness of force under the Fourth Amendment with the question of whether the law was clearly established for qualified immunity purposes. Stated otherwise, even if a court (or jury) were to find that Petitioners used excessive force under the Fourth Amendment, they would still be entitled to qualified immunity unless they violated clearly established law.

As stated above, the decision in this case is not the only time the Sixth Circuit has conflated the inquiry, contrary to the clear admonitions of *Saucier*. In *Sova*, the Sixth Circuit wrote that "qualified immunity in cases involving claims of deadly force is difficult to determine on summary judgment because liability turns upon the Fourth Amendment's reasonableness test." 142 F.3d at 902. *Sova* was applied more recently to deny qualified immunity based on a finding that "'there are contentious factual disputes over the

reasonableness of the use of deadly force.'" *Rodriguez*, 637 F.3d at 689 (quoting *Sova*, 142 F.3d at 903); *accord Murray-Ruhl*, 246 F. App'x at 343; *Smith*, 70 F. App'x at 819. Petitioners believe the Sixth Circuit's repeated error in their case warrants further review on the merits to clarify the distinction between the reasonable use of force for Fourth Amendment purposes and the reasonable interpretation of law inherent in the qualified immunity analysis.

In addition to denying qualified immunity solely based on a finding that it could not deem the force reasonable as a matter of law, the Sixth Circuit skipped entirely the crucial step in the inquiry of whether Petitioners violated clearly established law at the time the force was applied in July 2004. Instead, the Sixth Circuit denied qualified immunity because it determined that the force was distinguishable from case law decided three years after the fact. The inquiry, however, is whether the force was *prohibited* by clearly established law *at the time the force was used*. *Pearson*, 555 U.S. at 230 (finding the inquiry is whether the right was "clearly established" at the time of the events in question); *Filarsky v. Delia*, 132 S. Ct. 1657, 1668 (2012) (Ginsburg, J., concurring) ("Qualified immunity may be overcome, however, if the defendant knew or should have known that his conduct violated a right 'clearly established' *at the time of the episode in suit*.") (emphasis added). Any question as to the relevant time period was put to rest in *Brosseau*:

> Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation.

543 U.S. at 198.

Yet instead of focusing on the law at the time of Petitioners' conduct, the Sixth Circuit chose instead to minutely examine *Scott*, decided almost three years later in 2007, as a basis for judging Petitioners' entitlement to qualified immunity for conduct in 2004. Petitioners believe this error in the analysis is material given the "'hazy border between excessive and acceptable force.'" *Id.* at 201 (quoting *Saucier*, 533 U.S. at 206). Had the Sixth Circuit applied the proper analysis, it would have had to conclude that the use of force was *not* prohibited by clearly established law.

> To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate. This clearly established standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by

> ensuring that officials can reasonably anticipate when their conduct may give rise to liability for damages.

Reichle v. Howards, 132 S. Ct. 2088, 2093 (2012) (punctuation, citations, and internal quotation marks omitted). "[T]he right allegedly violated must be established, not as a broad general proposition . . . but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Id.* at 2094 (citation and internal quotation marks omitted). For this reason, "we do not define clearly established law at . . . a 'high level of generality.'" *Ashcroft*, 131 S. Ct. at 2084.

To determine whether Petitioners violated clearly established law, the Sixth Circuit should have examined precedent that existed as of July 2004 when the events in this case took place. Significantly, the shots that ultimately caused Rickard to lose control of his vehicle were fired when Rickard had maneuvered his vehicle in reverse and was about to speed away. At that precise moment, as the Sixth Circuit stated, "'Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle. Gardner then fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle.'" (Pet. App. at 6 (quoting Pet. App. at 24).)[5]

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[5] The shots that were fired before Rickard lost control of his vehicle came from three of the six Petitioners (Officers Plumhoff,

(Continued on following page)

Under these facts that formed the basis for the Sixth Circuit's decisions, Petitioners did not violate clearly established law, at least as of July 2004 when the force was used. Petitioners are law enforcement officers in West Memphis, Arkansas, which lies in the Eighth Circuit. Reasonable officers in their position would have been operating under Eighth Circuit precedent which clearly supports the use of force in this case. *Cole v. Bone*, 993 F.3d 1328, 1331 (8th Cir. 1993) (holding officer was justified in shooting and killing a driver who had driven recklessly to elude capture even though the path was "momentarily clear of civilian traffic"). Even if it had examined its own precedent, the Sixth Circuit would have had to find the force was not in violation of clearly established law at least as of July 2004. *See, e.g.*, *Dudley v. Eden*, 260 F.3d 722, 724-27 (6th Cir. 2001) (holding the officers were justified in firing shots at the fleeing suspect even though the "cars came to a complete stop" due to the suspect's "refusal to comply with the commands of armed policemen[ ] and his reckless driving"); *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) (holding the officers were justified in firing shots at a suspect who was about to turn on to a highway because his reckless driving in eluding arrest "posed an

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Gardner and Galtelli). (Pet. App. at 5-6.) Although the Sixth Circuit opinion stated that the other officers might be entitled to qualified immunity on remand, Judge Clay wrote a concurring opinion to specify that the denial of qualified immunity is absolute against *all* the officers. (*Id.* at 11 n.4 & 14-15.)

immediate threat to the safety of officers as well as innocent civilians"); *Smith v. Freland*, 954 F.2d 343, 344 (6th Cir. 1992) (holding the officer was justified in shooting and killing the suspect after he "backed up and zoomed around the police car" in an ongoing attempt to elude capture). The facts of these cases, which upheld the use of deadly force, are sufficiently analogous to the facts in this case to preclude a finding that Petitioners violated "clearly established" law in July 2004.

In denying Petitioners qualified immunity, however, the Sixth Circuit did not look at *any* precedent that existed at the time of the force but instead relied on distinctions from the facts in *Scott*, which was decided *after* the use of force in this case. If anything, the post-incident case law confirms that Petitioners did not violate law that was clearly established at any time. In that respect, this Court's decision in *Brosseau*, which was issued in December 2004, is particularly instructive.

Officer Brosseau, who was engaged in a foot pursuit, saw the suspect (Haugen) jump into a Jeep. Brosseau ordered Haugen to get out of the vehicle and pounded several times on the window with her gun, eventually shattering the glass and striking him on the head. Undeterred, Haugen started the Jeep and began to drive. Brosseau jumped back and fired her weapon "through the rear driver's side window at a forward angle, hitting Haugen in the back." 543 U.S. at 196-97. Brosseau acted out of fear for the "officers who she *believed* were in the immediate area,

and for the occupied vehicles in Haugen's path and for any other citizens who *might* be in the area." *Id.* at 196 (emphasis added) (punctuation and internal quotation marks omitted).

In a per curiam decision, this Court reversed the denial of qualified immunity to the officer. Relying in part on case law from the Sixth Circuit, this Court noted that "'a car can be a deadly weapon'" and that Haugen "'had proven he would do almost anything to avoid capture.'" *Id.* at 200 (quoting *Smith*, 954 F.2d at 347). This Court concluded that because no case clearly precluded Brosseau's use of force, her actions fell in the "'hazy border between excessive and acceptable force.'" *Id.* at 201 (quoting *Saucier*, 533 U.S. at 206). Accordingly, the denial of qualified immunity was reversed summarily on the petition for certiorari.

Petitioners believe that the Sixth Circuit's errors in analyzing their right to qualified immunity are as egregious as the Ninth Circuit's reasoning that led to this Court's summary reversal in *Brosseau*. Whereas the officer in *Brosseau* used her firearm based on a belief that the suspect *might become* a menace to the public, Petitioners used force after Rickard had *already proven to be* a danger to themselves and the general public. By then, Rickard had weaved through traffic on the interstate at a high rate of speed without regard to vehicles in his path. When he was surrounded by police officers on a Memphis street, he swung his vehicle around in reverse to avoid capture, narrowly missing officers standing in his path. In the process, the suspect struck the officers' vehicles, one

of them head-on.[6] As the Sixth Circuit found, the shots that caused Rickard to lose control of his vehicle were fired when "'Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle. Gardner then fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle.'" (Pet. App. at 6 (quoting Pet. App. at 24).) By continuing to use his vehicle as a dangerous weapon, Rickard demonstrated that he would not stop being a threat to the general public without a higher level of force being used. In sharp contrast, Brosseau fired shots at Haugen from behind out of a fear that he *might* drive menacingly and that there *might* be others in his path. If Officer Brosseau's use of deadly force did not violate clearly established law in December 2004, then it necessarily follows that Petitioners' use of the same force under similar circumstances did not violate clearly established law in July 2004.

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[6] If the Court obtains the videotapes, *see supra* note 2, Rickard's dangerous driving on the interstate and in Memphis can be seen on Officer Forthman's videotape at the minute markers 11:25 to 16:15. The head-on contact by Rickard is depicted vividly on Officer Galtelli's videotape at minute markers 02:35 to 02:38.

Rickard's reverse maneuver of his vehicle is captured on Officer Forthman's videotape at minute markers 16:25 to 16:30. That officers are in Rickard's path at that point is shown on Officer Ellis' videotape at minute markers 18:35 to 18:48. At that point shots are fired after which Rickard drives for a distance before losing control, almost hitting another car head-on, and then crashing the car himself, as depicted on Officer Forthman's videotape from minute markers 16:30 to 16:51.

At the very least, the Sixth Circuit should have examined cases that were decided as of July 2004 to identify the law that was clearly established as opposed to relying on distinctions from *Scott* which was issued in April 2007. Unlike civil rights lawyers or judges, officers do not have the luxury of freeze-framing each action and reaction to calculate the degree of force required. *Graham v. Connor,* 490 U.S. 386, 396 (1989) ("The 'reasonableness' of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). Here, the Sixth Circuit charged Petitioners with looking into the future to foresee fine distinctions that might be drawn from a set of facts that might be ruled admissible force in the future, as in this Court's 2007 decision in *Scott*. That is simply an unworkable and illogical burden to impose on Petitioners who had to make immediate decisions to quell the rapidly evolving and dangerous threat that Rickard posed to them and to the general public. Given the implications of these decisions on law enforcement policies and civil liability, in the Sixth Circuit and beyond, review by this Court is warranted.

B. The Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law.

As explained above, the Sixth Circuit denied qualified immunity to Petitioners based on a finding that the force was not clearly reasonable under Fourth

Amendment law, thereby inverting the "clearly established" inquiry. For the reasons provided above, Petitioners did not violate "clearly established law." Moreover, as a predicate, the Sixth Circuit should have found that the force was reasonable as a matter of law thereby rendering the "clearly established" inquiry moot.

Tellingly, the Sixth Circuit did not discuss the standards informing the Fourth Amendment analysis that balances the "nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (internal quotation marks omitted); *accord United States v. Place*, 462 U.S. 696, 703 (1983). In high-speed vehicular pursuits, the governmental interests are very strong because there is "an actual and imminent threat to the lives of pedestrians . . . , to other civilian motorists, and to the officers involved in the chase." *Scott*, 550 U.S. at 384; *see also Brosseau*, 543 U.S. at 196-97 (finding the officer acted out of a reasonable concern for the safety of other officers "and for any other citizens who might be in the area"). This Court further wrote: "we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger." *Scott*, 550 U.S. at 385.

That vehicles are dangerous instrumentalities is not a novel or unknown concept. As this Court explained in *Sykes v. United States*, the "[r]isk of

violence is inherent to vehicle flight." 131 S. Ct. 2267, 2274 (2011).

> Between the confrontations that initiate and terminate the incident, the intervening pursuit creates high risks of crashes. . . . It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others. Flight from a law enforcement officer invites, even demands, pursuit. As that pursuit continues, the risk of an accident accumulates. And having chosen to flee, and thereby commit a crime, the perpetrator has all the more reason to seek to avoid capture.

Id.

Even though this Court held in *Scott* that this governmental interest outweighs the "risk of serious injury or death" to the fleeing motorist, 550 U.S. at 386, the Sixth Circuit focused on whether the force was justified based on "the degree of danger that the officers were placed in as a result of Rickard's conduct." (Pet. App. at 10.) As in *Scott*, "[i]t was [Rickard] . . . who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that [Petitioners] confronted." 550 U.S. at 382. Also as in *Scott*, the fleeing suspect's vehicle struck a police officer's vehicle as part of the ongoing attempt to elude capture. *Id.* at 375 ("Respondent evaded the trap by making a sharp turn, colliding with Scott's police car, exiting the parking

lot, and speeding off once again down a two-lane highway.").

Inexplicably, the Sixth Circuit did not consider the relevant governmental interest of eliminating the risk *to the general public* inherent in Rickard's ongoing conduct. Instead, the Sixth Circuit sought to distinguish *Scott* because shots were fired at Rickard's vehicle from behind after Rickard had swung his vehicle around in reverse to avoid capture. But this identical scenario was present in *Scott* as well: "when Scott rammed respondent's vehicle it was not threatening any other vehicles or pedestrians." 550 U.S. at 380 n.7. It is this *risk*, and not just the fear of imminent harm to the officers, that justifies the use of force against the fleeing suspect. Further, in *Scott*, "[m]ultiple police cars with blue lights flashing and sirens blaring, had been chasing [the suspect] for nearly 10 miles but he ignored their warning to stop." *Id.* at 384. Likewise, in this case, Rickard engaged the police on an extended high-speed pursuit and, when cornered, used his vehicle to plow past the officers imploring him to stop. The Sixth Circuit should have found Petitioners' use of force was permissible as a matter of law based on the governmental interests in confronting the risk of harm that Rickard posed to the officers around him and to the general public.

Petitioners are mindful that the Fourth Amendment prohibits using deadly force solely to prevent a suspect's escape. *Tennessee v. Garner*, 471 U.S. 1 (1985). *Garner* involved an officer who shot an unarmed

suspect in the back of the head during a foot chase and is distinguishable where, as here, it is the means of flight itself that perpetuates the hazard to the public. *Scott*, 550 U.S. at 382 n.9. As in *Scott*, Rickard's use of his vehicle was akin to a suspect wielding a deadly weapon in a menacing manner. Lastly, the Sixth Circuit sought to distinguish *Scott* where the officer rammed the suspect's car as opposed to the shots that were fired in this case. But this distinction was rejected in *Scott* as well: "[w]hether or not Scott's actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable." *Id.* at 383.

In the final analysis, the sole distinguishing feature from *Scott* may be that at the time force was used in that case, the suspect was driving at a high rate of speed whereas Rickard had turned his car around and was trying to speed away. The fact remains that Officer Ellis had to step aside to avoid being hit by Rickard's vehicle at the time the force was used and by then, as in *Scott*, the suspect had shown that he was determined to elude capture at all costs, even maneuvering in reverse with officers standing around his vehicle attempting to make the lawful arrest.

Viewed from the perspective of the officers as required by Fourth Amendment jurisprudence, Petitioners reasonably believed that Rickard was an immediate threat to the safety of themselves and the general public, and that Rickard would continue to be a safety risk absent even more forceful intervention.

Under these circumstances, the Sixth Circuit should not have found a jury issue on the reasonableness of the force employed and should have upheld the qualified immunity defense as a matter of law on that basis.

Petitioners note that a finding that the force they used was permissible would simply mean the force was within the broad spectrum of Fourth Amendment reasonableness. Clear articulations of the reasonableness standard are necessary because court decisions such as the one in this case are guideposts for law enforcement agencies who can then formulate policies for particular jurisdictions. In that respect, the Sixth Circuit's decision has implications beyond the question of Petitioners' exposure to civil liability for the force applied in this case. For this reason as well, Petitioners believe review should be granted by this Court.

CONCLUSION

This case exemplifies that the Sixth Circuit's decisions conflict with fundamental principles established by this Court in the Fourth Amendment and qualified immunity contexts. Accordingly, Petitioners respectfully request that the decision of the Sixth Circuit denying qualified immunity be summarily

reversed, or alternatively, that a writ of certiorari be issued so full review can be had by this Court.

Respectfully submitted,

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NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION
File Name: 12a1178n.06

No. 11-5266

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ESTATE OF KELLY A. ALLEN, Deceased; CLAUDIA G. ALLEN; MARIA NICOLE ALLEN, a minor by next friend, Kenneth B. Allen; ALEXIS LANE ALLEN, a minor by next friend, Kenneth B. Allen; WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Plaintiffs-Appellees,

v.

CITY OF WEST MEMPHIS, et al.,

Defendants,

OFFICER VANCE PLUMHOFF; OFFICER JOHN BRYAN GARDNER; OFFICER TONY GALTELLI; OFFICER LANCE ELLIS; OFFICER JIMMY EVANS;

On Appeal from the United States District Court for the Western District of Tennessee

AMENDED

(Filed Nov. 14, 2012)

OFFICER JOSEPH FORTHMAN, individually and in their official capacity as an officer of the West Memphis Police Department,

Defendants-Appellants. /

Before: GUY and CLAY, Circuit Judges; HOOD, District Judge.*

RALPH B. GUY, JR., Circuit Judge. This litigation arose following the fatal shooting of Donald Rickard and Kelly Allen by West Memphis, Arkansas police officers. Plaintiffs each brought constitutional claims under 42 U.S.C. § 1983, as well as claims under state law against the individual police officers, the Mayor, and the Chief of Police. At plaintiffs' request all cases were consolidated for trial. All defendants filed motions for summary judgment, but the only issue involved in this appeal is the district court's determination that, as to plaintiff Rickard's excessive force claims, the defendant officers were not entitled to either qualified immunity or immunity under state law from liability for their actions.[1]

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* The Honorable Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] The district court dismissed the claims brought against the Mayor and Chief of Police. The court also dismissed the Fourth Amendment excessive force claims of the *Allen* plaintiffs. The *Allen* plaintiffs filed a cross-appeal from the dismissal of

(Continued on following page)

I.

West Memphis, Arkansas Police Officer Joseph Forthman stopped a white Honda Accord on July 18, 2004, at approximately midnight, for the reason that the car had only one operating headlight. The car was driven by Donald Rickard and had one passenger, Kelly Allen, seated in the front passenger seat.

As he approached the car, Forthman noticed an indentation in its windshield. Allen volunteered that the indentation in the windshield resulted from hitting a curb. Forthman questioned Rickard for a few moments, then asked him to get out of the car. Rather than get out, Rickard drove away. Forthman got in his police cruiser and began a pursuit.

Several additional West Memphis officers joined in the pursuit. Officer Vance Plumhoff became the lead officer in the chase. Four additional vehicles joined in the chase, driven by Officers Jimmy Evans, Lance Ellis, Tony Galtelli, and Bryan Gardner. Video cameras on three of the vehicles recorded all or part of the chase and subsequent activity.

Rickard entered the I-40 freeway heading east into Memphis and crossed over a bridge from Arkansas into Tennessee. During the chase, Plumhoff stated on the police radio that "he just tried to ram me." Forthman's statement that "he is trying to ram

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their excessive force claims, but the appeal was dismissed *sua sponte* by another panel of this court.

another car" was recorded, followed by his statement that "[w]e do have aggravated assault charges on him." In deposition, three officers (driving or riding in three different cars) described what appeared to them to be Rickard attempting to veer and/or ram his car into the moving police cars, which they reported over the police radio during the pursuit.

After Rickard and the pursuing police officers left the freeway via an exit ramp and entered Memphis, Tennessee

> the Rickard vehicle turned and exited I-40 onto Danny Thomas Boulevard. The pursuit was momentarily on Alabama Avenue before the Rickard vehicle turned right onto Danny Thomas Boulevard. At that point, Plumhoff made a statement on the radio about ending the pursuit. Evans replied, "terminate the pursuit?" Another voice can then be heard on the radio saying, "negative. See if you can get in front of him." As the Rickard vehicle approached Jackson Avenue, it made a quick right turn onto Jackson Avenue and contact occurred between the Rickard vehicle and a police vehicle. The contact caused the Rickard vehicle to spin around in a parking lot at the intersection of Danny Thomas Boulevard and Jackson Avenue. Separate Defendants assert that the Rickard vehicle then turned directly toward Plumhoff's vehicle and had a head-on collision with it. Plaintiffs dispute these statements and aver that the Rickard vehicle was still moving forward from the momentum caused by the spinout after

contact with Evans' vehicle and that this momentum caused the collision with Plumhoff's vehicle.

At or near this stage of events, the other officers formed a semicircle around the Rickard vehicle, attempting to use the building in the parking lot to prevent the vehicle from fleeing. Because of the building and the location of the police cars, the only unobstructed way for Rickard to escape was to back up. Rickard reversed in an attempt to escape, and as he did so Evans and Plumhoff exited their vehicles and approached the Rickard vehicle. Evans tried to get into the vehicle by pounding on the passenger-side window with his gun in his hand. Gardner and other officers also approached the vehicle. At this point, the wheels of the Rickard vehicle were spinning, and the vehicle made contact with Gardner's vehicle. Separate Defendants assert that the vehicle's engine was "revving," but Plaintiffs dispute this and state that the vehicle was rocking back and forth, and it is unclear whether the engine noise in conjunction with this rocking motion should be characterized as revving the engine.

Plumhoff fired three shots into the Rickard vehicle. The video from unit # 279 shows that Plumhoff was near the passenger-side of the vehicle when he fired those shots. The Rickard vehicle then reversed in a 180 degree arc onto Jackson Avenue heading east. As the Rickard vehicle reversed, Galtelli exited his vehicle and ran to join the other

> officers who were chasing the vehicle as it maneuvered onto Jackson Avenue. Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle. Gardner then fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle. Gardner fired all ten shots while the vehicle was moving forward (i.e., away from the officers). Galtelli also fired two shots at the vehicle. As the officers were shooting, Rickard was fleeing down Jackson Avenue. Rickard then lost control of the vehicle, and the Rickard vehicle crashed into a building at the corner of Jackson Avenue and Manassas Street. Both Rickard and Allen were killed.

Estate of Allen, et al. v. City of West Memphis, et al., Nos. 05-2489/2585, 2011 WL 197426, at *3 (W.D. Tenn. Jan.20, 2011) (citations omitted) (unpublished).

In its ruling on summary judgment as to the Rickard claims brought under § 1983, the district court determined that the facts, considered in a light most favorable to the plaintiff, established a violation of the Fourth Amendment. *Id.* at *10. Next, the district court found that the facts did not support the finding that a reasonable officer would have considered Rickard's continued flight a clear risk to others. *Id.* at *11. For this reason, the district court denied qualified immunity to all of the officers on the scene as to the Rickard § 1983 claims.

Concerning the Rickard state law claims, the district court determined that Tennessee law applied, and that the officers were therefore not eligible for statutory immunity under Arkansas law. The district court also determined that immunity was not available to the officers under various provisions of Tennessee law. *Id.* at *14-15.

This appeal followed the district court's ruling. After it was filed, the Rickard plaintiff moved to dismiss the appeal for lack of jurisdiction. A panel of this court initially granted the motion on the grounds that the qualified immunity determination of the district court turned on disputed factual issues. That order was vacated, and the issue was referred to the merits panel, following the defendants' petition for rehearing.[2]

II.

A. Qualified Immunity

A motion for qualified immunity denied on the basis of a district court's determination that there exists a triable issue of fact generally cannot be appealed on an interlocutory basis. *Johnson v. Jones*, 515 U.S. 304, 313 (2005). The Supreme Court, however,

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[2] On September 14, 2011, this court granted rehearing to consider our jurisdiction to review the denial of state law immunity, vacated our earlier dismissal of the qualified immunity appeal, and referred the entire motion to dismiss for action by the merits panel.

carved out an exception to this rule in *Scott v. Harris,* 550 U.S. 372 (2007). The Court emphasized that: "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Id.* at 380 (citations omitted). Reconciling *Scott* and *Johnson,* we stated that "where the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false, a court of appeals may say so, even on interlocutory appeal." *Moldowan v. City of Warren,* 578 F.3d 351, 370 (6th Cir. 2009) (citations and internal quotation marks omitted); *see also Austin v. Redford Twp. Police Dep't,* 690 F.3d 490, 496 (6th Cir. 2012) (after viewing video, affirmed denial of qualified immunity).

What makes these cases particularly relevant to the case at bar is the similarity of the facts here to the facts in *Scott.* The multi-car police chase of a fleeing speeder in *Scott* ended when one of the police cars intentionally rammed into the back of the fleeing car causing it to leave the road and crash, resulting in crippling injuries to the driver. All of this was captured on videotape. When the subsequent excessive force case was brought by the injured driver, the police defendant sought the protection of qualified immunity, which was denied. On interlocutory appeal, the court of appeals affirmed. The Supreme Court granted review and reversed. As might be expected, the police defendants in our case vigorously argue that *Scott* should control. Although the framework of the two cases is similar, as always, the devil

is in the details, and it is those details that cause us to conclude that *Scott* is distinguishable.

The fleeing motorist in *Scott* was still fleeing at very high speeds when he was rammed from behind. *Scott* framed the issue as: "Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?" The Court answered this question in the affirmative. In our case, the fleeing vehicle was essentially stopped and surrounded by police officers and police cars although some effort to elude capture was still being made.

Further, although the police in *Scott* used a maneuver to stop the fleeing car that might very well cause a crash and injury, the police here fired fifteen shots at close range, all but two of which apparently hit the subjects and twelve of which hit the driver. It's also worthy of note that when deciding to use lethal force, the police knew there was a passenger in the fleeing vehicle thus doubling the risk of death. The police make much of the fact that they felt they were in personal danger, but the degree to which that was true is not resolved by the video recordings.

Also, since the plaintiff in *Scott* survived, there were actually three versions of what occurred: the plaintiff's, the police defendants' and the video. The Supreme Court, in reversing the court of appeals, determined that the video resolved the questions at issue and granted summary judgment in favor of the

defendant. It wasn't that the video did not support plaintiff's version of what occurred, but rather that conceding plaintiff's version which was supported by the video, the conduct of the officer was reasonable as a matter of law. This is what the defendants ask us to conclude in this case.

However, the case at bar is more complex in its facts than was *Scott*. After carefully reviewing the video, as did the district judge, we cannot conclude that it provides clear support for either the plaintiff's or the defendants' version of what occurred. That is particularly true as it relates to the degree of danger that the officers were placed in as a result of Rickard's alleged conduct. Unlike in *Scott,* we cannot conclude that the officers' conduct was reasonable as a matter of law.[3]

Defense counsel stated at oral argument, in essence, that if lethal force is justified, officers are taught to keep shooting until the threat is over. The dictionary synonym for "lethal" is "deadly." As the Court in *Scott* explained in distinguishing the use of deadly force in *Tennessee v. Garner,* 471 U.S. 1 (1985), "'[a] police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person.'" *Scott,* 550 U.S. at 383 (quoting *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563, 1577

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[3] The district court made a number 3 of findings as to disputed issues of fact, which we do not repeat here, and which we cannot say were "blatantly and demonstrably false."

(11th Cir. 1992) (Edmonson, J., dissenting), *adopted by* 998 F.2d 923 (11th Cir. 1993) (en banc)). Nor does the Supreme Court's decision in *Sykes* compel a different result. *Sykes v. United States,* 131 S. Ct. 2267 (2011). The holding in *Sykes* that vehicular flight from an officer may categorically present "a serious potential risk of physical injury to another" so as to constitute a "violent felony" for purposes of sentencing enhancement under 18 U.S.C. § 924(e) addresses a question distinct from whether the force applied – including deadly force – to effect the seizure of a fleeing suspect in a given case was objectively reasonable as a matter of law under the Fourth Amendment.[4]

Usually, when we review an appeal from a denial of qualified immunity, we dismiss the appeal for lack of jurisdiction if the immunity was denied on the basis of genuine factual disputes. *Johnson,* 515 U.S. at 307. After *Scott,* however, it would appear that an

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[4] We note that the officers have filed all pleadings as a group and no distinctions were made among the officers. In *Bishop v. Hackel,* 636 F.3d 757, 767 (6th Cir. 2011), a qualified immunity appeal, the panel held "[t]he district court erred in this case by failing to evaluate the liability of each Deputy individually" and then proceeded to do so. We have not been asked to make such a review, nor have the defendants raised as an issue on appeal that there was no individual determination made in the district court. Nothing in this opinion, however, precludes the district court from considering on remand whether the individual defendants who did not fire their weapons may be entitled to qualified immunity. Additional discovery may be taken if necessary.

interlocutory appeal of a denial of qualified immunity which makes a good faith *Scott* claim requires us to review the record. *Scott,* 550 U.S. at 319 ("we concede that a court of appeals may have to undertake a cumbersome review of the record"). After this review if we reach the same conclusion as did the district judge, as we do here, it would seem that what we are doing is affirming that judgment. Whether we call it a dismissal for lack of jurisdiction or an affirmance of the denial of qualified immunity, the result is the same. *See, e.g., Austin,* 690 F.3d at 498-99.

B. State Law Immunity

The officers also contend they should be immune from liability under state law, and that the district court erred in determining they were not. These determinations by the district court are legal determinations, and our review is *de novo. DiCarlo v. Potter,* 358 F.3d 408, 414 (6th Cir. 2004).

The ruling of the district court concerning immunity under Arkansas law is only summarily addressed by the officers. Defendants state only that: "The trial court ruled that the officers were not eligible for statutory immunity pursuant to Arkansas law because they were in Tennessee: this is a question of law that this court can resolve." The officers do not dispute that Tennessee law applies to their state law claims, and have presented neither argument nor authority to establish why they might be entitled to statutory immunity under Arkansas law. We find this

issue to lack merit and, in any case, to have been waived on appeal. *See United States v. Phinazee,* 515 F.3d 511, 520 (6th Cir. 2008) (holding issues adverted to in only a perfunctory manner, unaccompanied by any effort at developed argument, are deemed waived).

Defendants rely first on the Interstate Fresh Pursuit Act, Tenn. Laws Ann. § 40-7-201, *et seq.*, to claim entitlement to immunity under Tennessee law. This statute gives officers of another state (here, Arkansas), who enter into Tennessee in "fresh pursuit" of a person they believe to have committed a felony in that other state, authority regarding actions they take to effect arrest and hold suspects in custody in Tennessee. As plaintiff points out, however, nothing in that statute addresses a police officer's *immunity* from suit for alleged civil rights violations, and we decline to further address this issue.

The officers' additional assertion that they are entitled to immunity under the Tennessee Governmental Tort Liability Act (TGTLA), Tenn. Code Ann. § 29-20-101 *et seq.*, merits no further consideration. The defendants, officers from West Memphis, Arkansas, do not contest the district court's determination that they do not meet the statute's requirements because "employees" covered by the statute are those of "governmental entities," which is defined as "any political subdivision of the *State of Tennessee.*" TENN. CODE. ANN. § 29-20-102(3) (emphasis added).

Finally, defendants argue that Tennessee's public duty doctrine shields them against negligence claims brought by plaintiff. The public duty doctrine is aimed at shielding a public employee from liability for an injury to an individual member of the public due to the public employee's breach of a duty owed to the public at large. As discussed in *Ezell v. Cockrell,* 902 S.W.2d 394 (Tenn. 1995), various public policy considerations support the recognition of the public duty doctrine, such as avoiding landing police officers in the "untenable position of insuring the personal safety of every member of the public, or facing a civil suit for damages." *Id.* at 398. The doctrine would not offer an officer protection from liability for an injury to the subject of the pursuit whose civil rights were allegedly infringed by that officer. The doctrine has no application here.

AFFIRMED.

CLAY, Circuit Judge, concurring. The majority states in footnote four: "Additional discovery may be taken if necessary." This language is at the very least misleading. It should be noted that additional discovery is not necessary for the qualified immunity inquiry here, because a qualified immunity defendant must argue "merely that his alleged conduct did not violate clearly established law." *Everson v. Leis,* 556 F.3d 484, 496 (6th Cir. 2009) (citing *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985)). Defendants "must be prepared to overlook any factual dispute and to

concede an interpretation of the facts in the light most favorable to the plaintiff's case." *Id.*; *Marvin v. City of Taylor*, 509 F.3d 234, 244 (6th Cir. 2007). Additional discovery with regard to the qualified immunity inquiry would run contrary to caselaw and thwart its purpose. *Skousen v. Brighton High School*, 305 F.3d 520, 527 (6th Cir. 2002) ("By refusing to address qualified immunity when it was raised, the district court had undercut one of the primary rationales for such immunity – to save officials from unwarranted discovery.") Thus, the language of footnote four risks confusing the district court into believing it would need to take additional discovery with respect to its qualified immunity determination; it does not.

To the extent the language merely encourages the district court to proceed with managing the case, which may include conducting additional discovery related to the merits of each claim asserted against each defendant following this appeal, the district court is fully aware of its power to do so.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ESTATE OF KELLY ALLEN, Deceased, CLAYTON DAVID ALLEN, MARIA NICOLE ALLEN, a minor by Next Friend, Kenneth Allen, ALEXIS LANE ALLEN, a minor by Next Friend, Kenneth B. Allen, Plaintiffs v. CITY OF WEST MEMPHIS, et al., Defendants/ Third Party Plaintiffs v. ESTATE OF DONALD RICKARD, deceased, through its Administrator SCOTT B. PEATROSS, *Consolidated with* WHITNE RICKARD, a minor child, Individually, and as Surviving Daughter of Donald Rickard, Deceased, by and through her mother SAMANTHA RICKARD, As parent and next friend, Plaintiff v. CITY OF WEST MEMPHIS, et al., Defendants.	Nos. 05-2489, 05-2585

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

Before the Court is Defendants Mayor William H. Johnson, Chief Robert Paudert, and West Memphis Police Officers Tony Galtelli, John Gardner, Lance Ellis, Jimmy Evans, Joseph Forthman, and Vance Plumhoff's (collectively the "Separate Defendants") November 30, 2009 Motion for Summary Judgment.[1] Each of the Plaintiffs[2] makes numerous claims against the Separate Defendants, alleging, *inter alia,* excessive force claims in violation of the Fourth and Fourteenth Amendments; violations of the Fifth and Sixth Amendments; tort claims arising under the laws of Arkansas or Tennessee, including assault and battery, malicious harassment, intentional infliction of emotional distress, false imprisonment, false arrest, and abuse of process; and violations of the Tennessee Constitution.

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[1] Although the Separate Defendants style their Motion as a Motion for Summary Judgment, they seek dismissal of some of the claims brought against them. The Court will address each of the claims separately and note whether the Separate Defendants seek summary judgment or dismissal of each claim.

[2] *Estate of Kelly Allen, et al. v. City of West Memphis,* No. 05-2489 was consolidated with *Whitne Rickard v. City of West Memphis,* No. 05-2585 on September 24, 2009.

The Separate Defendants maintain that actions taken by the West Memphis Police Officers were reasonable given the circumstances existing at the time of the incidents alleged and, thus, that their actions did not violate the Plaintiffs' constitutional rights; that the officers are entitled to qualified immunity for their actions; that the Separate Defendants are entitled to summary judgment based on privileges and/or statutory immunity; and that the claims against Mayor Johnson[3] and Chief Paudert should be dismissed.

Plaintiffs Alexis Lane Allen, Clayton David Allen, Maria Nicole Allen, and the Estate of Kelly A. Allen (collectively the "Allen Plaintiffs") filed a response to the Separate Defendants' Motion for Summary Judgment on January 25, 2010. Also on January 25, 2010, Plaintiff Whitne Rickard (the "Rickard Plaintiff") filed a response to the Separate Defendants' Motion for Summary Judgment.[4] The Separate Defendants filed a Reply to the Allen Plaintiffs and the

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[3] In their Reply, the Separate Defendants include a reference to the claims against Mayor Johnson in their discussion of the claims against Chief Paudert. (Defs.' Reply 10.) However, the Separate Defendants also assert that Mayor Johnson is not sued in his personal capacity, as the other individual Defendants are. (Defs.' Memo 7.) Therefore, the claims against Mayor Johnson should be considered tantamount to the claims against the City and not against him personally, and, thus, are not within the scope of the pending Motion. *See Moore v. City of Harriman*, 272 F.3d 769, 772 (6th Cir. 2001).

[4] "Plaintiffs" will refer to both the Allen Plaintiffs and the Rickard Plaintiff.

Rickard Plaintiff's responses on February 8, 2010. For the following reasons, the Separate Defendants' Motion is GRANTED IN PART and DENIED IN PART.

I. Background

The following facts are undisputed unless otherwise stated. The incidents giving rise to this lawsuit occurred around midnight on July 18, 2004, when West Memphis Police Officer Joseph Forthman initiated the traffic stop of a white Honda Accord (the "Rickard vehicle") in West Memphis, Arkansas. (Rickard Plaintiff's Response to Defendants' Statement of Facts, Dkt. 61, Exh. 5 ¶ 1.) ("Pl.'s SOF") Forthman was driving patrol unit # 279, which had a video camera that recorded the events from the initial traffic stop through the entire sequence of events. (Defendants' Statement of Facts, Dkt. 59, Exh. 2 ¶ 6.) ("Defs.' SOF") Donald Rickard was the driver of the Rickard vehicle and Kelly Allen was a passenger. Forthman stopped the vehicle because of an inoperable headlight. (*Id.* ¶ 2.)

Forthman approached the vehicle and asked the driver, Rickard, for his license and registration. (*Id.* ¶ 13.) As he approached the Rickard vehicle, Forthman noticed an indentation, "roughly the size of a head or a basketball," in the windshield. (*Id.* ¶ 14.) Forthman asked Rickard what was wrong with the windshield, and the passenger, Allen, answered that the car had hit a curb, causing damage to the

windshield. (*Id.* ¶¶ 16-17.) Forthman then glanced into the car and asked, "You haven't had any Keystone tonight have you?"; Rickard replied that he had not. (*Id.* ¶¶ 19-20.) After waiting for Rickard to produce his driver's license, Forthman asked Rickard to step out of the vehicle, "[b]ecause he was so nervous and he went over his I.D. card or driver's license several times without producing it to me." (*Id.* ¶¶ 24, 26.) Forthman states that he then asked Rickard twice to step out of the vehicle before the vehicle sped away. (*Id.* ¶ 28.)

Forthman returned to his vehicle and informed dispatch that he had a "runner," meaning someone fleeing the scene of a traffic stop. (*Id.* ¶ 29.) Officer Vance Plumhoff was close to the location where Forthman had stopped Rickard and heard that Forthman had a runner. (*Id.* ¶ 32.) Plumhoff quickly became involved in the pursuit and became "primary," meaning the lead vehicle in the chase. (*Id.* ¶ 33.) Plumhoff was driving patrol unit # 290, which did not have a video camera. (*Id.* ¶ 31.) Officer Jimmy Evans saw the Rickard vehicle, being pursued by two police vehicles, turn onto the Interstate 40 ("I-40") ramp heading east toward Memphis, Tennessee, and joined the pursuit. (*Id.* ¶ 34.) Evans was driving patrol unit # 205, which was not equipped with a video camera. (*Id.* ¶ 35.) Officer Lance Ellis was in route to aid Forthman in his stop, when he learned of the pursuit and joined the other officers in the pursuit. (*Id.* ¶ 36.) Ellis was driving unit # 284, which was equipped with a video camera that was able to record some of

the events at issue in this suit. (*Id.* ¶ 37.) Officers Troy Galtelli and John Gardner also joined the pursuit after finishing a traffic stop. (*Id.* ¶¶ 38-41.) Galtelli was driving unit # 286, which was equipped with a camera that was able to record some of the events; Gardner was driving unit # 287, which was equipped with a video camera that was nonoperational. (*Id.* ¶¶ 39, 41.)

Forthman, Plumhoff, Evans, Ellis, Galtelli, and Gardner pursued the Rickard vehicle as it headed east on I-40 toward Memphis. Forthman said over the radio, "we got enough [meaning vehicles to perform a rolling roadblock] lets shut him down before he gets to Memphis." (*Id.* ¶ 42 (alteration in original).) Evans then got in front of the Rickard vehicle to perform a rolling roadblock. (*Id.* ¶ 47.) As Evans was getting in front of the vehicle, Plumhoff said on the radio, "he just tried to ram me." (*Id.*) Although it is undisputed that Plumhoff made such a statement, the alleged attempted ramming is not clearly demonstrated on the video of unit # 279, which was behind Plumhoff and Rickard, and Plaintiffs dispute whether such an attempt was made. (Pl.'s SOF ¶ 47.) After nearing Plumhoff's car on the right side of the road, the Rickard vehicle moved left. Forthman can be heard on the radio saying, "he is trying to ram another car." (Defs.' SOF ¶ 54.) Plaintiffs again do not challenge that Forthman made such a statement, but assert that the stated activity is not clearly depicted on the video and dispute whether such an attempt was made. (Pl.'s SOF ¶ 54.)

After the officers' assertions that the Rickard vehicle had attempted to ram Plumhoff and then Evans, Forthman said over the radio, "[w]e do have aggravated assault charges on him West Memphis advise Memphis that we do have felony charges." (Defs.' SOF ¶ 62 .) Whether there were in fact felony charges at this point is disputed. (Pl.'s SOF ¶ 62.) As the pursuit continued over the I-40 bridge spanning the Mississippi River, Plumhoff can be heard saying that Rickard had another count of aggravated assault. (Defs.' SOF ¶ 64.) That activity is not clearly depicted on the video and is disputed. (Pl.'s SOF ¶ 64.)

Once in Memphis, Tennessee, the Rickard vehicle turned and exited I-40 onto Danny Thomas Boulevard. (Defs.' SOF ¶ 69.) The pursuit was momentarily on Alabama Avenue before the Rickard vehicle turned right onto Danny Thomas Boulevard. (*Id.* ¶ 71.) At that point, Plumhoff made a statement on the radio about ending the pursuit. Evans replied, "terminate the pursuit?" Another voice can then be heard on the radio saying, "negative. See if you can get in front of him." (*Id.* ¶ 72.) As the Rickard vehicle approached Jackson Avenue, it made a quick right turn onto Jackson Avenue and contact occurred between the Rickard vehicle and a police vehicle. (*Id.* ¶ 76.) The contact caused the Rickard vehicle to spin around in a parking lot at the intersection of Danny Thomas Boulevard and Jackson Avenue. (*Id.* ¶ 77.) Separate Defendants assert that the Rickard vehicle then turned directly toward Plumhoff's vehicle and had a

head-on collision with it. (*Id.* ¶¶ 83-85.) Plaintiffs dispute these statements and aver that the Rickard vehicle was still moving forward from the momentum caused by the spinout after contact with Evans' vehicle and that this momentum caused the collision with Plumhoff's vehicle. (Pl .'s SOF ¶ 86.)

At or near this stage of events, the other officers formed a semicircle around the Rickard vehicle, attempting to use the building in the parking lot to prevent the vehicle from fleeing. (Defs.' SOF ¶ 90.) Because of the building and the location of the police cars, the only unobstructed way for Rickard to escape was to back up. (*Id.* ¶ 93.) Rickard reversed in an attempt to escape, and as he did so Evans and Plumhoff exited their vehicles and approached the Rickard vehicle. (*Id.* ¶¶ 94-95.) Evans tried to get into the vehicle by pounding on the passenger-side window with his gun in his hand. (*Id.* ¶ 97.) Gardner and other officers also approached the vehicle. (*Id.* ¶¶ 98, 100 .) At this point, the wheels of the Rickard vehicle were spinning, and the vehicle made contact with Gardner's vehicle. (Pl.'s SOF ¶ 101.) Separate Defendants assert that the vehicle's engine was "revving," but Plaintiffs dispute this and state that the vehicle was rocking back and forth, and it is unclear whether the engine noise in conjunction with this rocking motion should be characterized as revving the engine. (*Id.* ¶ 102.)

Plumhoff fired three shots into the Rickard vehicle. (Defs.' SOF ¶ 103.) The video from unit # 279 shows that Plumhoff was near the passenger-side of

the vehicle when he fired those shots. (Videotape of Unit # 279, at 11:14:24.) The Rickard vehicle then reversed in a 180 degree arc onto Jackson Avenue heading east. (Defs.' SOF ¶ 108.) As the Rickard vehicle reversed, Galtelli exited his vehicle and ran to join the other officers who were chasing the vehicle as it maneuvered onto Jackson Avenue. (*Id.* ¶ 110.) Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle. (Pl.'s SOF ¶ 111.) Gardner then fired ten shots toward the vehicle, initially from the passenger side and then from the back of the vehicle. (*Id.* ¶ 114.) Gardner fired all ten shots while the vehicle was moving forward (i.e., away from the officers). (Deposition of Forthman, Dkt. No. 61, Exh. 1, at 158.) Galtelli also fired two shots at the vehicle. (Pl.'s SOF ¶ 116.) As the officers were shooting, Rickard was fleeing down Jackson Avenue. (Defs.' SOF ¶ 118.) Rickard then lost control of the vehicle, and the Rickard vehicle crashed into a building at the corner of Jackson Avenue and Manassas Street. (*Id.* ¶ 121.) Both Rickard and Allen were killed. The events between the time Rickard collided with Evans and spun out and the time Rickard fled down Jackson Avenue occurred within a matter of seconds. (*Id.* ¶ 120.)

II. Jurisdiction and Choice of Law

This Court has original jurisdiction to adjudicate federal claims under 28 U.S.C. § 1331 and supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367.

Plaintiffs' Complaint alleges various common law torts under Tennessee and/or Arkansas law. Separate Defendants assert that Arkansas law should be applied, and Plaintiffs assert that Tennessee law should be applied. (Defendants' Memorandum of Law in Support of Motion for Summary Judgment 26-29 ("Defs.' Memo"); Allen Plaintiffs' Memorandum in Response to Defendants' Motion for Summary Judgment 14-15 ("Allen Pls.' Resp."); Rickard Plaintiff's Memorandum in Response to Defendants' Motion for Summary Judgment 34 ("Rickard Pl.'s Resp.").) In a diversity case, a federal court applies the choice-of-law rules of the state in which it sits. *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 78 (1938). Therefore, the Court will apply Tennessee choice-of-law rules.

In *Hataway v. McKinley,* the Supreme Court of Tennessee adopted the "most significant relationship" approach to resolve conflict-of-law issues in tort cases. 830 S.W.2d 53, 54 (Tenn.1992). That approach is stated in the *Restatement (Second) of Conflict of Laws,* which provides that the law of the state where the injury occurred should be applied unless another state has a more significant relationship to the action. *Id.* at 59-60. The following factors from

Restatement (Second) § 6 provide guidance in determining which state has the most significant relationship:

> (a) The needs of the interstate and international systems,
>
> (b) The relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability, and uniformity of result, and
>
> (g) ease in the determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6(2). The court noted that a benefit of adopting this approach is its ease of application "in difficult cases because it provides a 'default' rule whereby trial courts can apply the law of the place where the injury occurred when each state has an almost equal relationship to the litigation." *Hataway,* 830 S.W.2d at 59.

Separate Defendants argue that Arkansas law should be applied because the relationship between decedents and Separate Defendants was centered in West Memphis, Arkansas; all Separate Defendants

were at all relevant times employees of an Arkansas municipality; and, but for Rickard's fleeing into Tennessee, the Defendant officers would never have entered Tennessee. (Defs.' Memo 27-28.) Plaintiffs argue that Tennessee law should apply because, although the chase began in Arkansas, it continued well into Tennessee; the spinout and vehicle contact occurred in Tennessee; the shootings and final vehicle crash occurred in Tennessee; the injuries occurred in Tennessee; and decedents were residents of Tennessee. (Allen Pls.' Resp. 15.)

Most of the material matters in dispute occurred in Tennessee. The interaction between the parties that resulted in the injuries and the alleged tortious behavior took place solely in Tennessee. Because the alleged tortious conduct and the injuries giving rise to this suit occurred in Tennessee, no state has a more significant relationship to this action than Tennessee. *See Hataway,* 830 S.W.2d at 59 (directing courts to apply the law of the place where the injury occurred even if another state has an almost equally significant relationship to the matter at issue). Therefore, the Court will apply Tennessee substantive law to Plaintiffs' state law claims. *Id.* at 54.

III. Standard of Review

A. Motion for Summary Judgment Pursuant to Rule 56

Federal Rule of Civil Procedure 56(a) provides that summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986). When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts establishing that there is a genuine issue for trial by showing that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.* at 247-48.

When confronted with a properly-supported motion for summary judgment, the nonmoving party may not oppose it by mere reliance on the pleadings. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Instead, the nonmoving party must present "concrete evidence supporting its claims and establishing the

existence of a genuine issue of fact." *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989) (citations omitted). The district court does not have a duty to search the record for this evidence; rather, the nonmovant has the duty to point out specific evidence in the record that would be sufficient to justify a jury decision in her favor. *InterRoyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989).

B. Motion to Dismiss Pursuant to Rule 12(b)(6)

In addressing a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the Court must construe the complaint in the light most favorable to the plaintiff and accept all well-pled factual allegations as true. *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007). A plaintiff can support a claim "by showing any set of facts consistent with the allegations in the complaint." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007). This standard requires more than bare assertions of legal conclusions. *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 361 (6th Cir. 2001). "[A] formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Any claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (*per curiam*). "Specific facts are not necessary; the statement need only 'give the defendant fair

notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* (citing *Twombly,* 550 U.S. at 555.) Nonetheless, a complaint must contain sufficient facts "to state a claim to relief that is plausible on its face" to survive a motion to dismiss. *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly,* 550 U.S. at 556). To survive a motion to dismiss, a complaint ultimately must demonstrate "facial plausibility," defined as "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted).

IV. Analysis

A. Qualified Immunity

The Separate Defendants assert that they are entitled to summary judgment on qualified immunity because their actions did not violate the constitutional rights of Donald Rickard or Kelly Allen and, even if a constitutional violation occurred, that violation was not of a clearly established right. (Defs.' Memo 7.)

Qualified immunity exists so that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,*

457 U.S. 800, 818 (1982) (citations omitted). Qualified immunity also protects law enforcement officers "from the sometimes hazy border between excessive and acceptable force." *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004) (*per curiam*) (citation and internal quotation marks omitted). "Qualified immunity is *an immunity from suit* rather than a mere defense to liability; and like an absolute immunity it is effectively lost if a case is erroneously permitted to go to trial." *Marvin v. City of Taylor,* 509 F.3d 234, 243 (6th Cir. 2007) (citation and internal quotation marks omitted; emphasis in original). The Sixth Circuit presumes that qualified immunity ordinarily applies. *See Chappell v. City of Cleveland,* 585 F.3d 901, 907 (6th Cir. 2009). Thus, the burden is on the Plaintiffs to show that the Separate Defendants are not entitled to qualified immunity. *Id.*

The qualified immunity analysis requires the Court to answer a threshold question: "Taken in t.he [sic] light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Marvin,* 509 F.3d at 244 (internal quotation marks and citations omitted); *accord Dunn v. Matatall,* 549 F.3d 348, 353 (6th Cir. 2008) (also raising question when reviewing qualified immunity at summary judgment stage). If the Court answers that question in the affirmative, the Court must decide "whether the right was clearly established . . . in light of the specific context of the case." *Marvin,* 509 F.3d at 244 (internal quotation marks and citation omitted; omission in original). "In other

words, qualified immunity need only be granted if there is a violation of a constitutional right, but that right was not clearly established at the time the official violated it." *Id.* If there is no constitutional violation, the claim fails as a matter of law, and no immunity is necessary. *Id.*

1. Rickard Plaintiff

Section 1983 itself does not create substantive rights, but provides "a method for vindicating federal rights elsewhere conferred." *Graham v. Connor,* 490 U.S. 386, 394 (1989) (citation and internal quotation marks omitted). The first step in addressing § 1983 excessive force claims is to identify the constitutional rights allegedly violated by the asserted application of force. *Id.* The Rickard Plaintiff alleges violations of rights secured by the Fourth and Fourteenth Amendments.

a. Constitutional Violation

Excessive force claims resulting from an investigatory stop are subject to the protections of the Fourth Amendment. *Graham,* 490 U.S. at 394; *see also Tennessee v. Garner,* 471 U.S. 1, 7 (1985) ("[T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.") In *Graham,* the Supreme Court made clear that "*all* claims that law enforcement officers have used excessive force-deadly or not-in the course of an . . . investigatory

stop . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395 (emphasis in original). The Rickard Plaintiff's constitutional claims brought pursuant to § 1983 must be analyzed under the Fourth Amendment's reasonableness standard.

The reasonableness standard asks "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397 (citations omitted). In analyzing the officers' actions, a court must "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Garner*, 471 U.S. at 8 (citations omitted). That balancing is the "key principle of the Fourth Amendment," *id.* (citation omitted), and "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Marvin*, 509 F.3d at 245 (citation omitted).

Factors to consider in determining whether an officer's actions are objectively reasonable are: the facts and circumstances of the case; the severity of the crime at issue in the case; the immediate threat that the suspect poses to the officers or others; and whether the suspect is actively resisting or evading arrest by flight. *See id.* (citation omitted). Reasonableness must be analyzed from the perspective of an

officer on the scene, as opposed to the "20/20 vision of hindsight." *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 486 (6th Cir. 2007) (quoting *Graham*, 490 U.S. at 396). That means the analysis "must embody allowance for the fact that police officers are often forced to make split second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Id.* (citation omitted). "[T]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case. . . ." *Graham*, 490 U.S. at 396 (citation and internal quotation marks omitted).

In *Tennessee v. Garner*, the Supreme Court analyzed a Fourth Amendment seizure resulting in death and considered whether the totality of the circumstances justified the officer's actions. *See Garner*, 471 U.S. at 4, 9. In balancing the interests, the Court noted that "[t]he intrusiveness of a seizure by means of deadly force is unmatched," and that deadly force frustrates both the interests of the individual and society in judicial determination of guilt and punishment. *Id.* at 9. Against those interests, the Court weighed the government's interest in effective law enforcement, noting that "[b]eing able to arrest [fleeing suspects] is a condition precedent to the state's entire system of law enforcement." *Id.* at 10. Nevertheless, the Court was "not convinced that the

use of deadly force is a sufficiently productive means of accomplishing [the government's goals] to justify the killing of nonviolent suspects." *Id.* (citation omitted). The Court noted that deadly force is a "self-defeating way of apprehending a suspect," *id.*, and found that, where the suspect poses no immediate threat to the officers present or to others, the harm from failing to apprehend him is less than the harm from using deadly force: "It is not better that all felony suspects die than that they escape." *Id.* at 11. The Court noted, however, that there are times when deadly force is not constitutionally unreasonable. *See id.* Where the suspect threatens an officer with a weapon or where there is probable cause to believe the suspect has inflicted or threatened to inflict serious physical harm, and where, if possible, the officers give some warning, deadly force may be used. *See id.* at 11-12.

The Separate Defendants assert that the officers' actions were objectively reasonable. Therefore, there is no constitutional violation. The undisputed facts do not support that assertion. The first shots were fired from the side of the Rickard vehicle. Although Plumhoff testified that he thought he was in front of the vehicle, the video shows that he was to the side of the vehicle and in no danger of being hit by the vehicle. (Videotape of Unit # 279, at 11:14:24.) The remaining 12 shots were fired as the vehicle was passing or had passed the officers. (Pl.'s SOF ¶¶ 114, 116.) None of the officers on the scene believed that either Rickard or Allen was armed; the suspects were

initially stopped because of an inoperable headlight; and the suspects were driving away from officers when the shots were fired. Thus, the severity of the crime at issue was low, and the suspects posed little immediate threat to the officers or others. Although the suspects were fleeing arrest, that factor alone is insufficient to support a finding that deadly force was objectively reasonable. *See Garner,* 471 U.S. at 11.

The Separate Defendants argue that, although the initial stop was a misdemeanor, the officers' conduct was objectively reasonable because "[t]he record is also filled with incidents of felonious aggravated assault and felonious fleeing by the driver against the officers before any force was employed." (Defs.' Memo 10.) Whether such assaults occurred is disputed. The first alleged assault occurred as the officers pursued the Rickard vehicle on I-40. *(See* Defs.' SOF ¶ 47.) The second occurred when the Rickard vehicle changed from one lane to another and allegedly attempted to run an officer off the road. (*See* Deposition of Forthman at 107.) No contact was made between the Rickard vehicle and any of the police vehicles while they were on I-40. Although the Rickard vehicle and the officers were engaging in a high-speed chase, the video of the pursuit does not show any assaults, but only the Rickard vehicle changing lanes. It is difficult to determine the exact proximity of the vehicles during the chase. The objective evidence here, the videos of the chase, would not support a reasonable person in concluding that there were aggravated assaults. Therefore, the officers' conduct

was not objectively reasonable, even from the officers' perspective. *See Scott v. Harris,* 550 U.S. 372, 380-81 (2007) (stating that, on a motion for summary judgment, the court may view the facts in the light depicted by videotapes). The alleged aggravated assaults cannot serve as the foundation for finding that the officers' actions were objectively reasonable, and, thus, for concluding that no constitutional violation occurred.

The Separate Defendants also argue that Rickard's attempt to exit I-40 quickly; his swerving in traffic while traveling at a high speed; his disregard for the safety of others, including civilians; and his "intentional ramming of two different police vehicles" could lead a reasonable officer to think Rickard was an immediate threat, thus making their conduct objectively reasonable. (*See* Defs.' Memo 11-12.) The first three actions the Separate Defendants cite were caused by the pursuit of the Rickard vehicle. The video images of the pursuit could lead to the conclusion that the officers also engaged in dangerous behavior by exiting I-40, swerving through traffic at high speeds, and compromising the safety of civilians. All of those factors would support an argument that the pursuit should have been terminated. However, dangerous conduct that was solely the product of engaging in a high-speed chase cannot serve as the foundation for deadly force. If those factors alone justified deadly force, deadly force would be constitutionally reasonable whenever officers engaged in a

high-speed pursuit. The Supreme Court has held that this is not so. *See Garner,* 471 U.S. at 9-11.

Although it must give deference to the officers on the scene, *see Williams,* 496 F.3d at 486, when ruling on a motion for summary judgment, a court may adopt the version of facts told by a videotape of the incident. *Scott,* 550 U.S. at 380-81. The videotape here shows only that the vehicles were changing lanes and swerving through traffic. Based on that evidence, the Court must concludes that the officers' perception that they were the victims of assault was not objectively reasonable. The severity of the crime at issue, a misdemeanor, was low. The only objectively reasonable threat that Rickard posed was the threat that the officers also posed by participating in the pursuit.

The Separate Defendants also argue that Rickard posed an immediate threat because he intentionally rammed two police vehicles in Memphis. (*See* Defs.' Memo 12.) Whether the Rickard vehicle intentionally collided with the vehicles or collided with the Plumhoff vehicle as a result of momentum from an unintentional collision with the Evans vehicle is a disputed issue of material fact. As such, it cannot serve as the foundation for concluding that the officers' conduct was objectively reasonable. *See Marvin,* 509 F.3d at 244 (stating that, in determining whether officers' conduct violated a constitutional right, the court views the evidence in the light most favorable to the party asserting the injury).

Finally, the Separate Defendants argue that the officers' conduct was objectively reasonable because Rickard actively resisted arrest by affirmatively dangerous conduct and flight. (*See* Defs.' Memo 12.) Rickard did resist arrest, but it is not clear that his evasion of arrest was sufficiently dangerous to justify deadly force. Although the Court must give deference to the split second decisions of the officers, it must analyze the factors as a reasonable officer at the scene would have perceived the events. In *Smith v. Cupp,* an officer shot a fleeing suspect, asserting that he fired because the suspect's vehicle "was bearing down on them." 430 F.3d 766, 770 (6th Cir. 2005). The officer in *Smith* claimed that the suspect "rapidly accelerated directly at [him] and [another officer]" and "fearing for his life," he "drew his gun and fired four times in rapid succession at [the suspect]." *Id.* (first alteration in original). Although the officer conceded after the fact that he had fired while the car was passing him, he asserted that he did so as he jumped out of the way of the vehicle. *Id.* The Sixth Circuit in *Smith* found that "[e]ven viewing the events in the heat of the moment, without 20/20 hindsight, a jury could conclude that a reasonable officer in [the officer's] position was never in any danger." *Id.* at 774. The court went on to acknowledge the deference that is given to an officer's decision to shoot an unarmed suspect in a chase, but reiterated that the officer must have a reasonable belief that the suspect presents an imminent danger. *See id.* Based on that analysis, the court affirmed the district court's denial of qualified immunity. *Id.* at 777.

In the instant suit, a reasonable jury could determine that the belief that danger was imminent was not reasonable. Thus, granting summary judgment based on the absence of a constitutional violation would be inappropriate. *See id.* at 775 (finding constitutional violation in a qualified immunity analysis where a "jury would . . . be entitled to determine that [officer's] use of force was unreasonable and accordingly unconstitutional.") The vehicle was fleeing as shots were fired. Although the Separate Defendants contend that the car was "revving" when the first shots were fired, that is a disputed issue. The vehicle then turned, and it is undisputed that it was headed away from all of the officers when the final twelve shots were fired. No officers or civilians were in front of the vehicle as it was fleeing, the fleeing suspects were not armed, and the officers had no reason to believe that the suspects were violent or would continue to pose a threat if they were not apprehended. *Compare id.* (finding that that [sic] a jury could determine that no reasonable officer would perceive that there was an imminent danger), *with Scott v. Clay Cnty., Tenn.*, 205 F.3d 867, 872, 878 (6th Cir. 2000) (finding that deadly force was reasonable as a matter of law against an unarmed fleeing suspect where, after leaping out of the car's path, the officer fired on the fleeing car as it turned directly toward another police cruiser), *and Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (finding that deadly force was not unreasonable as a matter of law where suspect had attempted to ram a cruiser, was cornered, sped forward, and crashed into a police cruiser

that was blocking his escape, and was speeding up a street toward a roadblock manned by other officers); *see generally Adams v. Speers,* 473 F.3d 989, 993 (9th Cir. 2007) (distinguishing case from others where qualified immunity was granted when, taking plaintiffs' facts as true, there was a lack of danger to the shooter and others and an absence of warning from the shooting officer); *Vaughan v. Cox,* 343 F.3d 1323, 1327, 1330 (11th Cir. 2003) (finding that district court erred in granting officer qualified immunity where officer contended that he fired during a pursuit because the suspect swerved as if to smash into his cruiser because a reasonable jury could find that fleeing suspect did not present an immediate threat). Therefore, the officers' use of deadly force was not objectively reasonable and a constitutional violation has occurred. *See Smith,* 430 F.3d at 775; *see also Sigley v. City of Parma Heights,* 437 F.3d 527, 536 (6th Cir.2006) (citations omitted) ("[W]here there are contentious factual disputes relating to the reasonableness of an officer's use of deadly force, the court is precluded from granting summary judgment for [the] officers. . . ." (citation omitted)).

b. Right Clearly Established

After determining that the facts, taken in the light most favorable to the Rickard Plaintiff, establish a constitutional violation, the Court must determine whether, in the specific context of this case, Rickard's right to be free from excessive force was "clearly established." *See Marvin,* 509 F.3d at 244; *see also*

Dunn, 549 F.3d at 352-53. Thus, the Court must determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Floyd v. City of Detroit,* 518 F.3d 398, 407 (6th Cir. 2008) (citation omitted). Although Rickard's right to be free from excessive force is clearly established, the relevant question is whether the officers' perceptions were reasonable in determining that Rickard posed a threat sufficient to justify deadly force.

To support their argument that the right was not clearly established, the Separate Defendants cite *Brosseau,* in which the Supreme Court states that no court has found a Fourth Amendment violation where a police officer "shot a fleeing suspect who presented a risk to others." 543 U.S. at 198 (citations omitted). However, the court in *Smith* addresses the opposite situation, where a fleeing suspect poses no immediate threat, and holds, "[i]t is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head." *Smith,* 430 F.3d at 775-76. As discussed above, the facts here do not support a finding that a reasonable officer would have considered the fleeing suspects a clear risk to others. Therefore, Rickard's right to be free of excessive force was clearly established and the officers are not entitled to qualified immunity as a matter of law on the Rickard Plaintiff's § 1983 claims.

2. Allen Plaintiffs

The Allen Plaintiffs' Amended Complaint alleges violations of Kelly Allen's rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. The Fifth Amendment applies only to actions of the federal government, and, thus, does not apply here. *See Scott,* 205 F.3d at 873 n.8. The Sixth Amendment right to a speedy and public trial is inapplicable on its face. Therefore, the Court need only address the Allen Plaintiffs' Fourth and Fourteenth Amendment claims. In determining whether to analyze the Allen Plaintiffs' claims under the Fourth Amendment, the issue is whether Allen was seized by the West Memphis Police Officers. A passenger or "innocent passerby" is not "seized" under the Fourth Amendment. A Fourth Amendment seizure occurs only "through means intentionally applied." *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 844 (1998) (citation omitted). The Fourth Amendment does not apply to passengers or other innocent third parties because "the authorities [cannot] 'seize' any person other than one who was a deliberate object of their exertion of force." *Claybrook v. Birchwell,* 199 F.3d 350, 359 (6th Cir. 2000) (citation omitted). Constitutional claims asserted by "persons collaterally injured" should be analyzed pursuant to "substantive due process norms." *Id.* (citation omitted). Therefore, the Allen Plaintiffs' Fourth, Fifth and Sixth Amendment claims are dismissed, and the Court will analyze the Allen Plaintiffs' claims under the Fourteenth Amendment.

Separate Defendants assert that they are entitled to qualified immunity on this claim and that their motion for summary judgment should be granted. As discussed above, the first step in a qualified immunity analysis is whether a constitutional violation has occurred. *See Floyd,* 518 F.3d at 404; *Marvin,* 509 F.3d at 244. The test for a Fourteenth Amendment violation is whether the alleged actions "shock the conscience" and violate the "decencies of civilized conduct." *Lewis,* 523 U.S. at 846 (citations omitted). Substantive due process is violated by government action only when that action "can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 847 (citation omitted). The Court in *Lewis* determined that in a high-speed chase, with "unforeseen circumstances demand[ing] an officer's instant judgment," the shocks-the-conscience analysis should be controlled by a malicious standard of proof, as opposed to a more relaxed "deliberate indifference" standard. *Id.* at 853-54. Because the officers in the instant suit were similarly engaged in a high-speed chase, where the initial collision and subsequent injuries occurred within a matter of seconds, the malicious standard of proof as applied and discussed in *Lewis* is the appropriate standard. *Id.* at 855; *see also Claybrook,* 199 F.3d at 360 ("[T]he 'malicious or sadistic' test of conscience-shocking behavior controls . . . because . . . [the officers] had no opportunity to ponder or debate their reaction to the dangerous actions of the armed man.") That standard is articulated in *Claybrook:*

> [I]n a rapidly evolving, fluid, and dangerous predicament which precludes the luxury of calm and reflective pre-response deliberation . . . public servants' reflexive actions "shock the conscience" only if they involved force employed "maliciously and sadistically for the very purpose of causing harm" rather than "in a good faith effort to maintain or restore discipline."

Claybrook, 199 F.3d at 359 (quoting *Lewis*, 523 U.S. at 853).

In applying the *Claybrook* standard, the most difficult cases are those where "executive action is worse than negligent but was not done for the purpose of injuring someone or in furtherance of invidious discrimination." *See Hunt v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 542 F.3d 529, 536 (6th Cir. 2008). In this middle ground, factors to consider in determining whether activity should be considered arbitrary are: (1) the voluntariness of the relationship between the government and the injured party; (2) whether the government actor was required to act in haste without deliberation; and (3) whether the government actor acted in pursuit of a legitimate governmental purpose. *Id.* In applying those factors, the court in *Hunt* noted that "as a general rule . . . where some countervailing, mandatory governmental duty motivated [the] action, the action will not shock the conscience." *Id.* at 543. Only in "extreme cases [will] the governmental actor's choice to endanger a plaintiff in the service of a countervailing duty . . . be

deemed arbitrary." *Id.; see also Jones v. Byrnes,* 585 F.3d 971, 978 (6th Cir. 2009) ("[A]lthough *Lewis* established in 1998 that an officer's conduct in a police chase could theoretically shock the conscience, there have been no examples of what specific kinds of conduct rise to that level.").

The instant case is not such a case. There is no evidence that the officers' actions were malicious or sadistic. The officers who shot Allen were pursuing a legitimate governmental objective – stopping a fleeing suspect – and as part of that objective shot and killed Allen. Regardless of whether the officers made the correct decision in pursuing the fleeing suspect, their behavior does not meet the exacting standard applicable here. It does not shock the conscience, establish that the officers' actions were arbitrary, or that their actions were the result of malice or sadism.[5] *See Lewis,* 523 U.S. at 855 (finding that an officer's behavior did not shock the conscience and noting that "[w]hile prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce [the fleeing suspect's] lawlessness, or to terrorize, cause harm, or kill."); *Claybrook,* 199 F.3d at 360 ("[E]ven if, as the plaintiffs have argued, the actions of the three defendant

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[5] In their Response to Separate Defendants' Motion, the Allen Plaintiffs recite the Model Penal Code's definition of recklessness. (Allen Pls.' Resp. 13.) They do not address whether the officers' conduct "shocks the conscience" or make any argument in favor of finding the officers' activity arbitrary.

patrolmen violated departmental policy or were otherwise negligent, no rational fact finder could conclude, even after considering the evidence in the light most favorable to [plaintiff], that . . . [defendants] acted with conscience-shocking *malice* or *sadism* towards the unintended shooting victim."). The Allen Plaintiffs have not established behavior that meets the high standard necessary to shock the conscience. Therefore, they have not established a constitutional violation under the Fourteenth Amendment. Because the Court has not found the violation of a constitutional right, it need not determine whether the right was clearly established and whether Separate Defendants are entitled to qualified immunity. *See Floyd,* 518 F.3d at 404 (citation omitted); *Marvin,* 509 F.3d at 244. Separate Defendants' Motion for Summary Judgment on the Allen Plaintiffs' Fourteenth Amendment claims is GRANTED.

B. Section 1983 Claims Against Chief Paudert

The Separate Defendants move to dismiss the § 1983 claims against Chief Paudert. Plaintiffs argue that Separate Defendants' Motion is premature. The Rickard Plaintiff asserts that the November 30, 2009 deadline was the deadline for Separate Defendants' dispositive motions dealing with qualified immunity only and that it would be premature to decide any claims beyond immunity. (Rickard Pl.'s Resp. 3.) To the extent Separate Defendants seek additional

relief, all Plaintiffs assert that the Motion is premature. Only two parties, Forthman and Plumhoff, have given depositions; there is much discovery to conduct; and the deadline for seeking dispositive relief other than qualified immunity has yet to pass. (*Id.* at 4; Allen Pls.' Resp. 14.) Specifically, Plaintiffs request that the Court refrain from addressing the claims against Chief Paudert until the parties take his deposition.

Plaintiffs' argument is not well-taken. The motion to dismiss was timely under the October 7, 2009 Scheduling Order, which set September 30, 2010 as the deadline for filing dispositive motions. (Rule 16(b) Scheduling Order, Dkt. No. 51, at 2.) "The Federal Rules of Civil Procedure allow for a Rule 12(b)(6) or a Rule 56 motion to be made at any time. Formal discovery need not have occurred." *Metro. Life Ins. Co. v. Biggs,* 68 F. App'x 644, 645 (6th Cir. 2003) (per curiam). Therefore, the motion to dismiss is not premature.

To state a § 1983 claim against an individual, a plaintiff must allege that the individual was personally involved in the alleged unconstitutional conduct. *See Grinter v. Knight,* 532 F.3d 567, 575 (6th Cir. 2008). In their Amended Complaints, Plaintiffs do not assert any personal involvement by Paudert beyond his supervisory responsibilities and his alleged public showing of support for the officers' actions after the shooting. Those allegations are insufficient to state a claim. There is no allegation that Paudert encouraged or approved the officers' conduct before it occurred or

directly participated in their conduct. *See Cardinal v. Metrish,* 564 F.3d 794, 802-03 (6th Cir. 2009) ("We have held that, even if a plaintiff can prove a violation of his constitutional rights, his § 1983 claim must fail against a supervisory official unless 'the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it.' 'At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.'") (citations omitted); *Shehee v. Luttrell,* 199 F.3d 295, 300 (6th Cir. 1999) ("[L]iability under § 1983 must be based on active unconstitutional behavior and cannot be based upon 'a mere failure to act.'") (citation omitted); *Poe v. Haydon,* 853 F.2d 418, 429 (6th Cir. 1988) (stating that, where the plaintiff alleged that supervisors were aware of sexual harassment but did not take appropriate action, the plaintiff's allegations were insufficient to impose liability on the supervisors under § 1983). Therefore, the § 1983 claims brought against Paudert in his individual capacity are DISMISSED. *See Iqbal,* 129 S. Ct. at 1949.

C. State Law Claims

Tennessee law applies to Plaintiffs' state law claims. Therefore, the Court need not address the Separate Defendants' arguments about immunity under Arkansas law, Ark. Code Ann. § 21-9-201; immunity from liability to felons under Arkansas Code Annotated § 16-120-301; and Plaintiffs' claims

pursuant to the Arkansas Civil Rights Act, Ark. Code Ann. § 16-123-105(a). The Arkansas claims are DISMISSED. *See Derthick Assocs., Inc. v. Bassett-Walker, Inc.*, Nos. 95-2230, 95-2231, 95-2232, 1997 WL 56908, at *4 (4th Cir. Feb.12, 1997) (affirming district court's dismissal of claims under Massachusetts law where district court concluded that Virginia law governed the dispute); *Elvig v. Nintendo of Am., Inc.*, 696 F. Supp. 2d 1207, 1215 (D. Colo. 2010) (dismissing claims under Washington law after finding that Colorado's choice-of-law rules require that Washington law not apply to plaintiffs' claims); *cf. Paul v. Deloitte & Touche LLP*, No. 06-225-MPT, 2007 WL 2402987, at *4 (D. Del. Aug. 20, 2007) (dismissing claim under Massachusetts law where the parties' contract required the application of Delaware law).

1. Immunity Under Tennessee law

The Separate Defendants assert that they are entitled to immunity for any allegations of false arrest, intentional infliction of emotional distress, and civil rights violations pursuant to the Tennessee Governmental Tort Liability Act ("TGTLA"), Tenn. Code Ann. §§ 29-20-101 *et seq.* (Defs.' Memo 41-42.) The TGTLA states:

> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury arises out of:

. . . .

> (2) false imprisonment pursuant to mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights.

Tenn. Code Ann. § 29-20-205. The TGTLA defines "employee" as "any official (whether elected or appointed), officer, employee or servant, or any member of any board, agency, or commission (whether compensated or not), or any officer, employee or servant thereof, of a governmental entity, including . . . police." Tenn. Code Ann. § 29-20-102(2). "Governmental entity" is defined as "any political subdivision of the state of Tennessee." *Id.* § 29-20-102(3)(A). Because none of the Separate Defendants is a governmental entity or an employee of a governmental entity, as defined by the TGTLA, the TGTLA does not provide Separate Defendants with immunity.

2. Felons Barred from Recovery

The Separate Defendants assert that they are entitled to absolute immunity from civil liability to the Rickard Plaintiff because any injuries were inflicted on Rickard while he was perpetrating a felony. (Defs.' Memo 43.) Pursuant to Tennessee Code Annotated § 29-34-201, a person is granted absolute immunity from civil liability, even for inflicting death, if:

> (A) The person was preventing or attempting to prevent the perpetrator from committing the offense or was apprehending the perpetrator of the offense; and
>
> (B) The perpetrator was committing one (1) or more of the offenses specified in subdivision (c)(1)-(9) or was attempting to commit one (1) or more of the offenses specified in subdivision (c)(10).

Tenn. Code Ann. § 29-34-201(b)(1). The Separate Defendants assert that subdivisions (c)(1), "[a]ny criminal homicide," and (c)(10), "[a]ttempt to commit first or second degree murder" are relevant here and provide them with immunity. (Defs.' Memo 42-43 (citing Tenn. Code Ann. § 29-34-201(c)(1), (10)).) Whether Rickard is properly considered a felon under the circumstances is a disputed issue of material fact. More pertinently, Separate Defendants allege only that Rickard committed attempted assault, which is not among the listed offenses. *See* Tenn. Code Ann. § 29-34-201(c). Because they have not alleged that Rickard committed any of the offenses for which this section grants immunity, the Separate Defendants' Motion for absolute immunity pursuant to § 29-34-201 is DENIED.

3. Tennessee Constitutional Claims

Separate Defendants assert that Plaintiffs' claims under the Tennessee Constitution should be dismissed because there is no separate right of action

under the Tennessee Constitution. (Defs.' Memo 44). Plaintiffs acknowledge that under Tennessee case law there is no private cause of action for violation of the Tennessee Constitution, but assert that the case law does not address the particular fact pattern presented here and does not account for the 1998 addition of Article I, Section 35 to the Tennessee Constitution. (Rickard Pl.'s Resp. 37.)[6]

Tennessee case law is clear: Tennessee does not recognize a private right of action for violation of the Tennessee Constitution. *See Bowden Bldg. Corp. v. Tenn. Real Estate Comm'n,* 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999); *see also Cline v. Rogers,* 87 F.3d 176, 179 (6th Cir. 1996); *Lee v. Ladd,* 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992), *appeal denied* (Tenn. 1992). The Court cannot alter this clearly established rule based on the particular facts of this case. Plaintiffs argue that the rationale in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), where the Supreme Court implied a

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[6] Article I, Section 35 of the Tennessee Constitution states, in pertinent part:

> To preserve and protect the rights of victims of crime to justice and due process, victims shall be entitled to the following basic rights:
>
> . . . .
>
> (2) The right to be free from intimidation, harassment and abuse throughout the criminal justice system;
>
> . . . .
>
> (7) The right to restitution from the offender.

cause of action for damages against federal officials who violated the Fourth Amendment, should extend to the Tennessee Constitution. (Rickard Pl.'s Resp. 40.) However, in *Lee,* the Tennessee Court of Appeals stated, "[s]o far as we are able to determine, the Tennessee courts have not extended the rationale of *Bivens* to give a state cause of action against a police officer for violating a person's civil rights." *Lee,* 834 S.W.2d at 325. Plaintiffs have cited no Tennessee case law contradicting this statement and extending the *Bivens* rationale to the Tennessee Constitution.

The adoption of Article I, Section 35 does not lead to a contrary conclusion. Since its adoption, Tennessee courts have continued to hold that Tennessee does not recognize a private right of action for violation of the Tennessee Constitution. *See, e.g., Crowe v. Bradley Equip. Rentals & Sales, Inc.,* No. E2008-02744-COA-R3-CV, 2010 WL 1241550, at *8 (Tenn. Ct. App. Mar. 31, 2010) (stating in 2010 that the plaintiff "fails to demonstrate that the General Assembly has created a private cause of action for violations of the Tennessee Constitution, and we know of no authority that recognizes a private cause of action for such violations") (citations omitted); *Bowden Bldg.* Corp., 15 S.W.3d at 446 (stating in 1999 that "Tennessee, however, has not recognized any such implied cause of action for damages based upon violations of the Tennessee Constitution") (citations omitted). Therefore, Separate Defendants' Motion to Dismiss the claims arising under the Tennessee Constitution is GRANTED.

4. Malicious Harassment

Plaintiffs have asserted claims of malicious harassment pursuant to Tennessee Code Annotated § 4-21-701. This Court has previously ruled that a malicious harassment claim "must be related to the victim's race, color, ancestry, religion or national origin." *Order Denying Plaintiffs' Motion to Certify Question to the Supreme Court,* Dkt. No. 32, at 5 (Nov. 13, 2006). Nevertheless, the Rickard Plaintiff argues that the Court should not rule on this issue until the Western Section of the Tennessee Court of Appeals rules in *Bowman v. City of Memphis,* No. W2009-00084-COA-R3-CV. (Rickard Pl.'s 40.) In a January 27, 2010 Opinion, the Tennessee Court of Appeals reaffirmed that a plaintiff must demonstrate conduct motivated by race, color, religion, ancestry, or national origin to state a claim of malicious harassment. *Bowman v. City of Memphis,* No. W2009-00084-COA-R3-CV, 2010 WL 322632, at *3 (Tenn. Ct. App. Jan. 27, 2010). Neither the Rickard Plaintiff nor the Allen Plaintiffs allege that any of the actions of the West Memphis Police Officers were motivated by race, color, ancestry, religion, or national origin. Therefore, the malicious harassment claims are DISMISSED.

5. Assault and Battery

Tennessee common law defines assault as "any act tending to do corporal injury to another, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of

using actual violence against that person." *Thompson v. Williamson Cnty.*, 965 F. Supp. 1026, 1037 (M.D. Tenn. 1997) (citation omitted). Battery in Tennessee requires a showing that a person committed a "conscious and volitional act" that was a harmful or offensive touching of another without privilege. *See City of Mason v. Banks,* 581 S.W.2d 621, 626 (Tenn. 1979).

The Separate Defendants move to dismiss the assault and battery claims against Paudert because he was not present during the events in question and because he was not personally involved in the pursuit. (Defs. Memo 34.) Plaintiffs' Amended Complaints do not allege that Chief Paudert was present. Therefore, they have not stated a claim of assault or battery against Chief Paudert and the claims of assault and battery against Paudert are DISMISSED.

The Separate Defendants also move to dismiss the assault claims as against all West Memphis Police Officers pursuant to Tennessee Code Annotated § 40-7-108, which states that a law enforcement officer has the right to use force reasonably necessary to apprehend a person resisting arrest. (Defs.' Memo 34.) Separate Defendants argue that it was reasonable for the officers to use force to apprehend Rickard and Allen in light of the facts and circumstances. (*Id.* at 34-35.) Separate Defendants seek dismissal of the claims, but their argument, citing their statement of undisputed facts and requesting the Court to find the officers' actions objectively reasonable, is properly

analyzed under a summary judgment standard. For the reasons discussed above in Section IV.A.1, summary judgment should not be granted in the instant case based on a finding that the officers' actions were reasonable as a matter of law. Separate Defendants' Motion on the assault claims against the officers is DENIED.[7]

Defendants Ellis, Forthman, and Evans seek dismissal of the claims of battery against them because the Plaintiffs cannot show that these officers ever offensively touched Rickard or Allen. (Defs.' Memo 35.) In response, Plaintiffs argue that these arguments are premature because discovery is ongoing and they have yet to depose Ellis or Evans. (Rickard Pl.'s Resp. 35.) Because these Defendants do not cite to the record, the Court construes their request as a motion to dismiss based on the allegations in the Amended Complaints. *See Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008). A plaintiff need not have completed discovery before a court decides a motion to dismiss. *See Tucker v. Union of Needletrades, Indus. and Textile Emps.*, 407 F.3d 784, 787-88 (6th Cir. 2005). The allegations in the

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[7] Granting Separate Defendants' Motion on these claims would also be improper under the language of Tennessee Code Annotated § 40-7-108, which states that an officer may use deadly force "only if all other reasonable means of apprehension have been exhausted or are unavailable" and "where feasible, the officer has . . . given a warning that deadly force may be used unless resistance or flight ceases." Tenn. Code Ann. § 40-7-108(b).

Amended Complaints do not plausibly suggest that Ellis, Forthman, or Evans intentionally inflicted harmful or offensive physical contact on Rickard or Allen. Therefore, Plaintiffs' battery claims against Ellis, Forthman, and Evans are DISMISSED. *See Iqbal,* 129 S. Ct. at 1949; *Hensley Mfg. v. ProPride, Inc.,* 579 F.3d 603, 609 (6th Cir. 2009); *Geeslin ex rel. Geeslin v. Bryant,* No. 06-2768-STA, 2010 WL 2365329, at *4 (W.D. Tenn. June 9, 2010).

Defendants Plumhoff, Gardner, and Galtelli assert that the claims of assault and battery against each of them should be dismissed because each's [sic] actions were justifiably in self-defense and in defense of third parties. (Defs.' Memo 35.) These Defendants seek dismissal, but their argument and the facts submitted are properly analyzed under a summary judgment standard. The Separate Defendants argue that these three officers had a reasonable basis to believe that the Rickard vehicle posed a threat to their safety, and, thus, the claims of assault and battery cannot stand. (Defs.' Memo 35-36); *see also* Tenn. Code Ann. § 40-7-108. For the reasons discussed above in Section IV.A.1 and footnote 7, that argument cannot prevail. Separate Defendants' Motion on the assault and battery claims against Plumhoff, Gardner, and Galtelli is DENIED.

6. Intentional Infliction of Emotional Distress and Outrage

Intentional infliction of emotional distress ("IIED") and the tort of outrage are the same tort under Tennessee law. *See Moorhead v. J.C. Penney Co.,* 555 S.W.2d 713, 717 (Tenn. 1977). To establish a claim of IIED under Tennessee law, a plaintiff must show that "(1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was so outrageous that it cannot be tolerated by civilized society; and (3) the defendant's conduct resulted in serious mental injury to the plaintiff." *Lourcey v. Estate of Scarlett,* 146 S.W.3d 48, 51 (Tenn. 2004) (citing *Bain v. Wells,* 936 S.W.2d 618, 622 (Tenn. 1997)). To satisfy those elements, it is not enough to show that a defendant "has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress." *Id.* (citation and internal quotation marks omitted). Rather, a plaintiff must also show that defendant's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (citation and internal quotation marks omitted).

The Separate Defendants argue that these claims should be dismissed because no facts are asserted to support a claim of IIED, but cite their statement of material facts in support of their argument. (Defs.' Memo 38.) Therefore, the Court regards the Separate Defendants' motion on this issue as one for summary

judgment. Plaintiffs argue that these claims are premature and should not be addressed at this stage of the litigation. Plaintiffs have alleged facts sufficient to state a claim of IIED. At this stage, granting summary judgment in favor of the Separate Defendants would be improper. The Court DENIES Separate Defendants' Motion on the IIED claims without prejudice.

7. False Imprisonment and False Arrest

To bring a claim of false imprisonment under Tennessee law, a plaintiff must show: detention or restraint against his will and the unlawfulness of such detention or restraint. *Coffee v. Peterbilt of Nashville, Inc.*, 795 S.W.2d 656, 659 (Tenn. 1990). False arrest and false imprisonment are separate torts under Tennessee law. "A false arrest is one means of committing a false imprisonment, but a distinction has been drawn between the two in that a false arrest must be committed under assumption of legal authority." *Stubblefield v. Hawkins Cnty.*, No. 2:06-CV-129, 2007 WL 4365758, at *5 (E.D. Tenn. Dec. 11, 2007) (quoting 35 C.J.S. *False Imprisonment* § 2 (1960)). Where, as here, the alleged false imprisonment arises out of the arrest of plaintiffs, the two torts are essentially the same. *Id.*

Separate Defendants move to dismiss Plaintiffs' claims of false imprisonment and false arrest because the officers had probable cause to stop Donald Rickard.

(Defs.' Memo 40.) Because they cite to facts in the record beyond the pleadings, the Court construes their request as a motion for summary judgment. *See Hensley Mfg.*, 579 F.3d at 613. At this stage, granting summary judgment in favor of the Separate Defendants would be improper. The Court DENIES Separate Defendants' Motion on the false imprisonment and false arrest claims without prejudice.

8. Other Tennessee Claims

The Plaintiffs have alleged abuse of process under Tennessee law. "An action for abuse of process cannot be maintained where the process was employed to perform no other function than that intended by law." *Priest v. Union Agency,* 125 S.W.2d 142, 143 (Tenn. 1939). Plaintiffs do not state an abuse of process claim here. Therefore, Separate Defendants' Motion to Dismiss Plaintiffs' abuse of process claim is GRANTED.

Finally, the Separate Defendants argue that they are entitled to immunity on the wrongful death claims pursuant to the TGTLA. Because the TGLTA provides Defendants with no immunity, they are not entitled to immunity.

V. Conclusion

For the foregoing reasons, the Court GRANTS the Separate Defendants' Motion for Summary Judgment on the Allen Plaintiffs' Fourteenth

Amendment claims, GRANTS the Separate Defendants' Motion to Dismiss the Allen Plaintiffs' Fourth, Fifth and Sixth Amendment claims, and GRANTS the Separate Defendants' Motion to Dismiss the § 1983 claims against Paudert in his individual capacity, the malicious harassment claims, the claims under the Tennessee Constitution, the assault and battery claims against Paudert, the battery claims against Ellis, Forthman, and Evans, and the abuse of process claims. The Separate Defendants' Motion is DENIED as to all other claims.

So ordered this 19th day of January, 2011.

s/ Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

No. 11-5266

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESTATE OF KELLY A. ALLEN, DECEASED, ET AL.,	)	
Plaintiffs-Appellees,	)	
v.	)	
CITY OF WEST MEMPHIS, ET AL.,	)	ORDER
Defendants,	)	(Filed Dec. 13, 2012)
OFFICER VANCE PLUMHOFF, ET AL.,	)	
Defendants-Appellants.	)	

BEFORE: GUY and CLAY, Circuit Judges; and HOOD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

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* Hon. Denise Page Hood, United States District Judge for the Eastern District of Michigan, sitting by designation.

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

Deborah S. Hunt, Clerk

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JUN - 7 2013
OFFICE OF THE CLERK

No. 12-1117

In The
Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a Minor Child, Individually and as Surviving Daughter of Donald Rickard, Deceased, by and through her Mother Samantha Rickard as Parent and Next Friend,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Whether the Sixth Circuit properly affirmed the district court's denial of qualified immunity to police officers who chased a vehicle containing an unarmed man and woman from West Memphis, Arkansas across the Mississippi River bridge into Memphis, Tennessee and then killed both occupants with a total of fifteen gunshots fired into the vehicle (1) when there are disputes as to whether aggravated assaults claimed by the officers occurred and they do not show on the video (2) when there are disputes as to whether the officers reasonably perceived threats to themselves or others, and (3) when there are disputes as to whether their actions were ultimately objectively reasonable given that the video evidence demonstrates that the first three shots were fired by an officer from the passenger side of the vehicle, and the remaining twelve gunshots were fired by two other officers as the vehicle was passing and had passed the officers and was continuing to drive away from them down the street with no one in front of the vehicle (all of which is plainly demonstrated on the video).

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Whitne Rickard respectfully opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case, issued on November 14, 2012, reproduced in the Appendix to the Petition ("Pet. App.").

Ms. Rickard respectfully provides this Brief in Opposition to the Petitioners' Petition pursuant to the instructions contained in a letter received from William K. Suter, Clerk, dated May 8, 2013 directing this Court's request for a response in this case on or before June 7, 2013.

STATEMENT OF THE CASE

This is a case about the shooting death of Donald Rickard and Kelly Allen, two occupants of a car who died in July of 2004, after running from police in West Memphis, Arkansas.[1] At the end of a high speed chase across the Interstate 40 bridge from Arkansas

[1] Pursuant to Sup. Ct. R. 15.3, Ms. Rickard as Respondent respectfully notes a perceived factual misstatement presented by Petitioners, which presumably was not intentional. Specifically, at page 7 of their Petition, Petitioners state that Officer Forthman, who commenced the pursuit, was "joined by officers in four other vehicles" in pursuing Rickard. The actual number of other vehicles should be five, one each for Officers Plumhoff, Ellis, Gardner, Galtelli, and Evans (in addition to Forthman).

into Memphis, Tennessee, the driver of the vehicle, Donald Rickard, spun out and was partially cornered, but backed up, turned around and headed away from the pursuing officers eastbound on Jackson Avenue in Memphis. Three different officers fired a total of fifteen gunshots at or into the vehicle. Ms. Kelly Allen was a passenger in the vehicle. Both occupants of the vehicle, which crashed into a house shortly after the shooting, were killed. This lawsuit followed. The case was initially filed in state court in Tennessee and was then removed by the Petitioners to the district court for the Western District of Tennessee.

This case was stayed for a period of years (while the State of Tennessee pursued criminal charges against Officers Plumhoff, Gardner and Galtelli and those charges resulted in appellate proceedings). Two of the involved officers (Plumhoff and Forthman) were deposed in August of 2009, and the Petitioners filed their motion for summary judgment (the denial of which prompted the Petitioners' interlocutory appeal) on or about November 30, 2009. Although many claims and many defenses were raised and considered, principally at issue is the reasonableness of the pursuit itself and particularly the use of force in the form of fifteen gunshots at the vehicle. The issues were extensively briefed in the district court, and the district court issued its ruling on January 20, 2011. In its Order (Pet. App. at 17-62), the district court made a series of findings and rulings.

The findings and rulings of the district court

First, as pertinent to the Petitioners' appeal, the district court found that the Rickard excessive force claims were properly analyzed under the Fourth Amendment. Although the district court noted that there is a certain amount of built-in deference to the officers' on-the-scene judgment, the undisputed facts do not support the defense arguments that the officers' actions were objectively reasonable. The court noted that the first [three] shots were fired at the passenger side of the vehicle and the remaining [twelve] shots were fired while the vehicle was passing the officers or after it had already passed them. The court found that the officers did not believe the suspects were armed, the severity of the underlying crime was low, and there was little threat posed to the officers. The court added that the mere act of fleeing alone was insufficient to support a finding that deadly force was objectively reasonable. The court also found that whether the claimed aggravated assaults (claimed by the officers) occurred is disputed. The court observed that there was no contact between the vehicles on I-40 and the dashboard camera video shows only lane changes and swerving, and it is difficult to tell from the video what the proximity of the vehicles was to each other. The court further found that the conduct of the officers was not objectively reasonable, as the officers, who claimed Rickard

drove dangerously, could also be found to have driven dangerously under the circumstances.[2]

The district court noted, per this Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007), that it could adopt the version of the facts as shown on the video. From the court's observation of the video, the vehicles changed lanes and swerved. The court concluded that the aggravated assault claims made by the officers were not objectively reasonable, adding that Donald Rickard resisted arrest, but it was not clear that his evasion of arrest was dangerous enough to justify deadly force. Therefore, the court found that the use of deadly force was not objectively reasonable in this case and a constitutional violation occurred, as Donald Rickard had a clearly established right to be free from excessive force.

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[2] The characterization of the Petitioners at page 7 of their Petition that Rickard sped "recklessly" through city streets is that of the Petitioners and not the court. The same is true of the Petitioners' characterization at page 10, FN.4 of their Petition of Mr. Rickard's driving as "speeding away recklessly" as he attempted to flee while the officers' final twelve gunshots were fired into the vehicle. Despite the statements of the Petitioners that they have accepted Ms. Rickard's version of the facts for purposes of the appeal, such characterizations demonstrate that Petitioners in reality have taken issue with several facts and have presented subjective perception as though it were fact in many instances, as they continue to do with this Court, even while attempting to provide grudging lip service to the idea that they have accepted Ms. Rickard's version of the facts for purposes of this appeal to meet a legal requirement.

In its analysis of the use of deadly force based upon *Tennessee v. Garner*, 471 U.S. 1 (1985), the district court duly noted the balance to be struck between the competing objectives of the government's interest in effective law enforcement and the unmatched intrusiveness of a seizure by means of deadly force. The district court quoted *Tennessee v. Garner* for the proposition that it is not better that all suspects die than that they escape. The district court noted that the intrusiveness of a seizure by means of deadly force is unmatched. Pet. App. at 35. The district court further found it to have been clearly established that Donald Rickard had a right to be free from excessive force. Pet. App. at 41-42. Therefore, the fundamental backdrop against which the district court found genuine issues of material fact can be summarized fairly succinctly: (1) There are disputes as to whether the claimed aggravated assaults occurred, and they do not show on the video; (2) there are disputes as to whether the officers reasonably perceived threats to themselves or others; and (3) there are disputes as to whether their actions ultimately were objectively reasonable. The district court properly took into account the fact that *fifteen total gunshots* were fired. The first three were fired by Sgt. Plumhoff while he was to the right of the Rickard vehicle on the passenger side (which is plainly demonstrated on the Unit 279 video), and the remaining twelve gunshots were fired by Officers Gardner and Galtelli *as the vehicle was passing and had passed the officers and was continuing to drive*

away from them down the street with no one in front of the vehicle.

These are the findings and rulings the Sixth Circuit affirmed. Pet. App. at 11-12.

REASONS FOR DENYING THE PETITION

Respectfully, this case does not present suitable issues for this Court's exercise of its discretion to accept an appeal. Some key arguments presented to this Court by Petitioners now were not presented to the Sixth Circuit. Additionally, notwithstanding the arguments of the Petitioners, the Sixth Circuit's analysis of the qualified immunity issues presented in this case does not represent a departure from appropriate analysis for this type of case. Fundamentally, decisions of the various federal circuits and indeed this Court itself make clear that the analysis of qualified immunity is necessarily case-dependent and fact-specific. The process over time has turned into a comparison of the facts and circumstances of different cases, with patterns that emerge but not necessarily ironclad rules.

However, the ultimate effect of the Petitioners' arguments is to advocate for a "one-size-fits-all" rule (an approach this Court rejected in *Scott v. Harris*), specifically to ask this Court to endorse the notion that a large number of close-range gunshots (fifteen

in total) is justified against an unarmed fleeing suspect *because the suspect has fled*.

ARGUMENT

The Sixth Circuit Court of Appeals did not err in affirming the district court's denial of qualified immunity. It did not err in its methodology, and it did not err in finding that it could not deem the force used in this case to be reasonable as a matter of law.

I. The Sixth Circuit did not err in its methodology of denying qualified immunity.

The Petitioners contend that the Sixth Circuit erred in its statement that it could not conclude that the force in this case was reasonable as a matter of law, as opposed to prohibited by clearly established law. Pet. at 11. They proceed to devote several pages in their Petition to arguments that the Sixth Circuit inverted qualified immunity analysis by failing to address whether the right to be free from excessive force was clearly established in this case, and argue that the Sixth Circuit skipped such a step (Pet. at 15) in violation of the "rigid order of battle" of *Saucier v. Katz*, 533 U.S. 194 (2001).

Respectfully, this is a new argument of the Petitioners, not previously made to the Sixth Circuit, and should therefore be deemed waived. On that basis alone the Petition should be denied. Moreover, the

effect of their argument is to rely upon the "rigid order of battle" formulation of this Court's opinion in *Saucier v. Katz*. However, they concede, as they must, the "relaxation" of *Saucier*'s "rigid order of battle" in *Pearson v. Callahan*, 555 U.S. 223 (2009), in which this Court indicated that the "rigid order of battle" should not be regarded as an inflexible requirement (noting that there are cases in which the constitutional question is so fact-bound that the decision provides little guidance for future cases).

Again, as an important threshold matter, this specific argument was not presented to the Sixth Circuit itself, either in the Petition for Rehearing filed by the Petitioners in the Sixth Circuit on October 19, 2012 (Respondent's Appendix A), or in their Modified Petition for Rehearing in the Sixth Circuit filed on November 15, 2012 (Respondent's Appendix B). Despite two occasions in which the Petitioners could have presented such argument directly to the Sixth Circuit, the Sixth Circuit was not called upon by Petitioners to address the alleged analytical deficiency the Petitioners now contend this Court should address in its discretion.[3] Consequently, this entire

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[3] The same is true of Petitioners' reliance upon cases such as *Dudley v. Eden*, 260 F.3d 722 (6th Cir. 2001); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), discussed at page 18 of their Petition, and *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998). These cases were not argued to the Sixth Circuit by Petitioners.

line of argument should be deemed waived, and should be ample basis alone for this Court's exercise of its clear discretion to deny the Petition.

Additionally, since this Court decided in *Pearson v. Callahan* not to require *Saucier*'s "rigid order of battle" as an absolute, this issue would not provide a proper legal basis for this Court to review this case. Stated more simply, beyond the fact that it was not timely presented to the Sixth Circuit, there would be no precedential novelty to determining that *Saucier*'s rigid order of battle is not an absolute requirement of analyzing qualified immunity defenses. The Petition should therefore be denied on either of these bases.

However, in the alternative, responding to this new position of the Petitioners out of an abundance of caution, Ms. Rickard provides the following. The Petitioners' arguments fail to account for the overall procedural and substantive backdrop of the case, specifically the manner in which the case came to the Sixth Circuit and the rulings the Sixth Circuit affirmed. What the Sixth Circuit was affirming was not just a series of findings and analysis of the issue of whether the force at issue was excessive, but also a specific determination by the district court that the right to be free from excessive force was clearly established.

A brief procedural summary of the case is in order. The Petitioners (defendants below) moved for summary judgment and the district court granted summary judgment in certain respects (which are not

issue for purposes of the instant Petition) and denied summary judgment in part. The part of the ruling at issue for purposes of this appeal is the district court's denial of qualified immunity to the officers. In its ruling, the district court conducted extensive analysis of the issue of whether the Petitioners were entitled to qualified immunity. Pet. App. at 30-42. In denying qualified immunity to the officers, the district court found that a constitutional violation occurred. Pet. App. at 32-41. The district court also found it to be clearly established that Donald Rickard had a right to be free from excessive force. Pet. App. at 41-42. Therefore, qualified immunity was denied to the officers.

It was this ruling that the Sixth Circuit affirmed on appeal, but only after the Sixth Circuit had initially first dismissed the Petitioners' appeal based upon this Court's opinion in *Johnson v. Jones*, 515 U.S. 304 (1995) and had then vacated its own order dismissing the Petitioners' appeal and had granted the Petitioners a merits panel appeal. *See* Pet. App. at 7. Ms. Rickard had moved to dismiss the appeal on the basis that the interlocutory appeal of the officers was directed to disagreements with the district court's review of the facts and the district court's finding of the existence of factual disputes, which were questions of evidentiary sufficiency foreclosed by this Court's opinions in *Johnson v. Jones*, 515 U.S. 304 (1995), and *Crawford El v. Britton*, 523 U.S. 574, 595 (1998) (declining to craft an exception to settled rules of interlocutory appellate jurisdiction and rejecting the argument that the policies behind the immunity

defense justify interlocutory appeals on questions of evidentiary sufficiency).

Although the Sixth Circuit initially dismissed the Petitioners' appeal, the Petitioners sought a panel hearing and were granted the merits panel appeal they sought and the Sixth Circuit reviewed the findings of the district judge and the video evidence. The Sixth Circuit also indicated, in a footnote in its November 2012 opinion, that the district court had made a number of findings of disputed fact which the Sixth Circuit was not repeating in its opinion, and which it could not say were "blatantly and demonstrably false." Pet. App. at 10, FN.3. This was a clear reference to a principle upon which the Sixth Circuit relied from this Court's opinion in *Scott*, enabling a reviewing court to rely on the video evidence in cases such as the instant case in assessing a qualified immunity defense.

Ultimately then, the Sixth Circuit, having initially dismissed this interlocutory appeal pursuant to *Johnson v. Jones*, indicated the following about its ruling:

> Usually, when we review an appeal from a denial of qualified immunity, we dismiss the appeal for lack of jurisdiction if the immunity was denied on the basis of genuine factual disputes. *Johnson, 515 U.S. at 307*. After *Scott*, however, it would appear that an interlocutory appeal of a denial of qualified immunity which makes a good faith *Scott* claim requires us to review the record. *Johnson,*

> *515 U.S. at 319* ("we concede that a court of appeals may have to undertake a cumbersome review of the record"). After this review if we reach the same conclusion as did the district judge, as we do here, it would seem that what we are doing is affirming that judgment. Whether we call it a dismissal for lack of jurisdiction or an affirmance of the denial of qualified immunity, the result is the same.

Pet. App. at 11-12.

In light of the procedural history of the case, the logic of *Johnson v. Jones*, and the district court findings the Sixth Circuit affirmed in its opinion, the belated arguments of the Petitioners fail. The Sixth Circuit affirmed a ruling that not only found a violation of constitutional rights, but also that the right to be free from excessive force was clearly established. That much has been clear since this Court's opinion in *Tennessee v. Garner*, 471 U.S. 1 (1985) (indicating it is constitutionally unreasonable to shoot an unarmed suspect dead from behind in order to prevent escape) and this Court's opinion in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (approving the firing of one shot at a suspect attempting to flee in a vehicle as within the "hazy border" between acceptable and excessive force) did not alter that in the context of this case. Stated more simply, if *Brosseau v. Haugen* (decided in December of 2004, which was also after the events of this case, but is nevertheless argued by the Petitioners, *e.g.*, at page 21 of their Petition) found one gunshot to be in the "hazy border" between

acceptable and excessive force, *Brosseau* seemingly could not be authority for a determination that *fifteen* shots would be reasonable as a matter of law; yet, in effect, Petitioners argue that fifteen shots should be held reasonable as a matter of law, and therefore not a violation of clearly established law.

The Petitioners also contend that the Sixth Circuit erred in analyzing and distinguishing this Court's opinion in *Scott v. Harris* specifically because this Court's decision in *Scott* (2007) post-dated the events of this case (2004). The Petitioners contend at page 16 of their Petition that instead of focusing on the law at the time of Petitioners' conduct, "the Sixth Circuit chose instead to minutely examine *Scott*." Respectfully, this argument is misplaced for several reasons. First, the specific argument that the Sixth Circuit was in error for analyzing *Scott* because it post-dated the events of this case is another argument that was not presented to the Sixth Circuit by the Petitioners in either of their two Petitions for Rehearing, and as a new argument presented for the first time to this Court it should be deemed waived. Second, the right to be free from excessive force was clearly established before *Scott*. The district court so found, and it was this finding that the Sixth Circuit affirmed. This Court's opinion in *Tennessee v. Garner* clearly established the right to be free from excessive force, as it is unreasonable to seize an unarmed suspect by shooting him dead. 471 U.S. at 11. Third, as the opinion of the Sixth Circuit below notes, the Petitioners themselves urged *Scott* in the Sixth

Circuit. They did so in the district court as well, they urged *Scott* on its substance in their two Petitions for Rehearing in the Sixth Circuit, and their Petition reveals that they continue to urge *Scott* before this Court, even as they contend that it was error for *Scott* to have been addressed and distinguished by the Sixth Circuit.

This point is addressed additionally below because of the extent to which Petitioners have sought to rely on *Scott*, although they now claim the Sixth Circuit erred in considering *Scott*. However, regardless of the Petitioners' belated arguments about the timing of *Scott*, it was clearly established long before 2004 and long before *Scott* that under the Fourth Amendment, where a suspect poses no immediate threat to the officers and to others, the harm resulting from failure to apprehend him does not justify the use of deadly force to do so. *Tennessee v. Garner.*[4] This was a clearly established prohibition on the use of deadly force to stop an unarmed fleeing suspect, particularly the degree of force used in this case.

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[4] Additionally, because the Petitioners attempt to rely upon Eighth Circuit precedent for a geographical argument that their conduct should be judged by Eighth Circuit precedent rather than the Sixth Circuit, it should be noted that the Eighth Circuit indicated in another alleged excessive force case involving the City of West Memphis and Officer Jimmy Evans, as Defendants, among others, that the right to be free from excessive force in the context of an arrest is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures. *Nance, et al. v. Sammis, et al.*, 586 F.3d 604, 611 (8th Cir. 2009), *cert. den.*, 131 S. Ct. 69 (2010).

II. The Sixth Circuit did not err in denying qualified immunity by finding the use of force was not reasonable as a matter of law.

As their second category of claimed error, the Petitioners contend that the Sixth Circuit erred in denying qualified immunity by finding the force was not reasonable as a matter of law. They specifically contend at page 23 of their Petition that the Sixth Circuit should have found the force to have *been* reasonable as a matter of law. Their arguments depend in large measure upon *Scott*, which they urged repeatedly in the Sixth Circuit, and continue to urge to this Court for its substance, even while they now insist the Sixth Circuit was in error to address it and distinguish it.

They have specifically relied upon *Scott* not only for the proposition that a court can review video evidence of events in evaluating a qualified immunity defense, but also to argue per *Scott* that their actions were permissible. Indeed, *Scott* was a significant reason for their urging the district court and the Sixth Circuit to review the video evidence in order to attempt to transfer *Scott*'s acceptance of the conduct at issue in *Scott* to this case. They even go so far in their Petition as to take a quotation from *Scott* and substitute Mr. Rickard's name in place of the suspect in *Scott* as though *Scott* can be applied to this case for its substance (*see* Pet. at 24). Therefore, their assertion that the Sixth Circuit Court of Appeals was in error for its resort to *Scott* should begin from a position of some skepticism.

The Petitioners state to this Court that the force at issue in this case is "similar to the force ruled permissible" in this Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007). Pet. at i. Respectfully, that statement brings one of the single most important distinctions into focus: *Scott* involved a vehicular ramming and approved the ramming under the facts in that case.

However, this case, unlike *Scott*, involved gunfire – fifteen total shots. Therefore, the Petitioners' effort to obtain unilateral advantage by extrapolating what Petitioners are bound to perceive as the "good" from *Scott*, while ignoring what they must perceive as the "bad," must fail based upon the observations contained in this Court's *Scott* opinion itself: a shooting is quite different from a chase. It is also very important to emphasize (regrettably, perhaps to the point of repetition) that although events began with a chase, what occurred in this case was not the firing of just one shot, as was found to be within the "hazy border between excessive and acceptable force" in *Brosseau v. Haugen*, 543 U.S. 194 (2004). By noteworthy contrast in this case, officers fired *a total of fifteen gunshots at the vehicle*, most of which occurred as the vehicle was passing or had already gone past the officers. This was duly observed by the district court and the Sixth Circuit Court of Appeals. Pet. App. at 5-6, and 23-24. On this note, it is significant that the Petitioners nevertheless urge this Court, per *Brosseau*, to reverse the holding of the court below summarily, as though *Brosseau* can be transferred to

the facts of this case to justify the shooting in this case dispositively. Pet. at 6. As a matter of degree, Ms. Rickard respectfully submits that if one shot to stop a suspect from fleeing in a vehicle is within the "hazy border" between excessive and acceptable force, the firing of fifteen total shots at a fleeing vehicle should not be the basis for a summary reversal of a holding denying qualified immunity.

A. This Court's opinion in *Scott v. Harris* approved a police officer's ramming of a suspect vehicle but also distinguished ramming a vehicle from shooting a suspect.

In *Scott v. Harris*, this Court addressed the permissibility of ramming a suspect's vehicle from behind under the Fourth Amendment. This Court found, under the facts in that case, that the ramming did not violate the Fourth Amendment. As what may be one of the most significant "takeaway points" from the opinion, this Court noted the value of a videotape capturing the events in question in order to review the propriety of the actions of the police. 550 U.S. at 378. It is also very important to note that Petitioners are urging to this Court that the Sixth Circuit was in error for finding factual distinctions between this case and *Scott*, when the Petitioners themselves have argued *Scott* for the value the Petitioners perceive in the holding of *Scott* that it was constitutionally permissible for the police to ram the suspect's vehicle. However, *Scott* is a police "ramming" case and not a

police "shooting" case. Although both *Scott* and this case did have a chase in common, the force ultimately at issue in this case is not a ramming – it is gunfire. Because this case is a shooting case, the district court (appropriately) focused on *Tennessee v. Garner*, and that led to the findings which the Sixth Circuit ultimately affirmed.

This Court itself has noted the significance of the difference between ramming and shooting. In *Scott v. Harris*, this Court specifically rejected efforts to transfer the principles of *Tennessee v. Garner* to the fact pattern in *Scott* (again, a ramming):

> Whatever *Garner* said about the factors that *might* have justified shooting the suspect in that case, such "preconditions" have scant applicability to this case, which has vastly different facts. "*Garner* had nothing to do with one car striking another or even with car chases in general . . . A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person."

Scott v. Harris, 550 U.S. at 383, quoting *Adams v. St. Lucie County Sheriff's Department*, 962 F.2d 1563, 1577 (11th Cir. 1992) (italics emphasis in original).

This Court added that although the efforts of the Respondent in *Scott v. Harris* to craft an easy-to-apply legal test in the Fourth Amendment context were admirable (which is also ultimately what the Petitioners seek to do in this case), "in the end we must still slosh our way through the factbound morass of

'reasonableness.'" *Scott*, 550 U.S. at 383. This Court also noted that in determining the reasonableness of a Fourth Amendment seizure, "we must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott*, 550 U.S. at 383. The Court noted that the Respondent in *Scott* posed a threat to others and to officers, and a risk of injury or death to himself, "though not the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head [citation to *Tennessee v. Garner* omitted], or pulling alongside a fleeing motorist's car and shooting the motorist." *Scott*, 550 U.S. at 384 (italics emphasis in original).

It is significant to note that for that particular proposition (the near certainty of death posed by shooting a motorist from alongside the vehicle), this Court cited *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003). In *Vaughan*, the Eleventh Circuit affirmed the denial of qualified immunity to an officer who fired four shots at a vehicle whose driver was not submitting to a "rolling roadblock" on an Atlanta area interstate highway. Citing and applying *Tennessee v. Garner*, the Eleventh Circuit in *Vaughan* found that a reasonable jury could find that the officer acted unreasonably. 343 F.3d 1323, 1329-1330. The Eleventh Circuit specifically noted that a reasonable officer would have known that firing into the cab of a pick-up truck at approximately 80 miles per hour on an interstate would transform the risk of an accident on the highway into a virtual certainty. *Id.* at

1332. Therefore, qualified immunity was denied in *Vaughan*.

B. The Petitioners' discussion of *Walker v. Davis* necessitates clarification and ultimately brings key factual distinctions between vehicular "ramming" cases and "shooting" cases into sharper focus, ultimately helping to show that this Court should not grant this Petition.

In support of their argument that the Sixth Circuit was in error for distinguishing *Scott v. Harris* because it was decided three years after the force utilized in this case, the Petitioners cite the case of *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011), as an example of a Sixth Circuit case distinguishing *Scott* to deny qualified immunity for pre-2007 conduct. Specifically, the Petitioners state that the dissent in *Walker* indicates that the "Sixth Circuit stands alone in this analysis," as though the Sixth Circuit acknowledges a pattern of error in its cases. Petition, at i.

Respectfully, no such statement appears in the *Walker* opinion. Therefore, the Petitioners' efforts to fasten the *Walker* dissent to this case as if *Walker* contains some sort of admission by the Sixth Circuit that it has engaged in a pattern of "rogue" or "miscreant" qualified immunity analysis must be viewed as a significant stretch, particularly when the Petitioners attempt to apply it to the facts of this case.

There are several reasons for this, and those reasons help bring important distinctions into focus. First, like *Scott v. Harris* but unlike this case, the force at issue in the *Walker* case involved a *ramming* of a suspect's vehicle. Again, at the risk of unnecessary repetition, although this case began with a chase, the force at issue is not ramming by police, but police gunfire: fifteen total shots at close range. The district court in *Walker* denied the officers summary judgment, indicating based upon *Tennessee v. Garner* that it was clearly established (indeed "settled law for a generation") under the Fourth Amendment that where a suspect poses no immediate threat to the officer and to others, the harm resulting from failure to apprehend him does not justify the use of deadly force to do so. 649 F.3d 502, 503.

The dissent in *Walker* did address a series of ***ramming*** cases from three other circuits, affirming the grant of qualified immunity. The dissent also addressed, from "the other end of the spectrum," three other opinions of the Sixth Circuit, which Petitioners reference in a preliminary portion preceding their main body of argument at page 5 of their Petition referring to the difficulty of determining qualified immunity in deadly force cases with liability turning on the Fourth Amendment's reasonableness test. Those cases are *Murray-Ruhl v. Passinault*, 246 Fed.Appx. 338, 2007 U.S. Dist. LEXIS 21573 (6th Cir. August 29, 2007) (a later version of which is *Rodriguez v. Passinault*, 637 F.3d 675 (6th Cir. 2011)) and *Smith v. Kim*, 70 Fed.Appx. 818, 2003 U.S. App. LEXIS 14559

(6th Cir. July 17, 2003). The Petitioners urge these cases as being part of a pattern of "repeated error" by the Sixth Circuit.

An additional case not mentioned by the Petitioners but addressed by the Sixth Circuit in *Walker* is *Kirby v. Duva*, 530 F.3d 475 (6th Cir. 2008). *Smith v. Kim* involved a shooting, but not in conjunction with a vehicular chase, as occurred in this case. However, *Kirby* and *Murray-Ruhl* did specifically involve officers shooting at fleeing motorists rather than ramming, and are therefore worthy of additional discussion. The *Walker* dissent noted that in those [shooting] cases the Sixth Circuit had held that it was clearly established at the time of the shootings under *Tennessee v. Garner* that police officers may not fire at non-dangerous fleeing felons.

In *Kirby*, the suspect was pulled over by police but attempted to flee, using his car. Unarmed, he was shot multiple times by officers on the scene, and died. Closely paralleling the number of shots fired in this case, the opinion indicates a total number of thirteen shots, with Kirby being hit by nine of those shots. 530 F.3d 475, 480. Apparently, there was no video evidence available. Officers and independent witnesses gave conflicting accounts of whether the vehicle was moving in a threatening manner toward officers. *Id.* at 478-480. The district court found that a reasonable jury could find excessive force had been used and that Kirby had a clearly established right to be free from excessive force. On appeal to the Sixth Circuit, the officers argued that there was no violation of a clearly

established right because the officers would have feared for their safety. In reliance principally upon *Tennessee v. Garner*, the Sixth Circuit found that the Plaintiffs' version of events supported a holding that a Fourth Amendment violation had occurred, and that the right to be free from such force was clearly established. 530 F.3d 475, 482-484.

In *Murray-Ruhl v. Passinault*, 246 Fed.Appx. 338, 2007 U.S. Dist. LEXIS 21573 (6th Cir. August 29, 2007) summary judgment was affirmed for one officer (Jenkins), but qualified immunity was denied to another officer (Passinault, who fired a total of twelve shots at a truck as the truck passed him). The Court noted conflicting versions of events given by the parties, and among those were conflicts between the two officers, with Jenkins testifying that he was not in the truck's path, but Passinault indicating he fired at the truck after it passed him because he feared it was bearing down on Jenkins. 2007 U.S. App. LEXIS 21573 at *7. Discussing *Tennessee v. Garner*, and *Brosseau v. Haugen*, the Sixth Circuit noted the significance of the fact that "Passinault emptied his weapon at the vehicle, reloaded it, and fired at Murray perhaps as many as a dozen times even after the truck had passed him by," which was after he could reasonably have believed that the truck would have posed a threat to himself or Jenkins. *Id.* at *15. Distinguishing some of the same cases the district court in this case distinguished (*Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992), and *Scott v. Clay County, Tennessee*, 205 F.3d 867 (6th Cir. 2000)),

the Sixth Circuit found that the Plaintiff's version of events presented a situation in which there was a question as to whether the officer could reasonably believe anyone's life was endangered by Murray as he attempted to flee, and a jury could find that no reasonably competent officer would have shot the victim. 2007 U.S. App. LEXIS 21573 at *19-22. As to whether the constitutional right at issue was clearly established, the Sixth Circuit also found that where the suspect poses no immediate risk of death or serious danger, *Tennessee v. Garner* provides a clearly established right to be free from excessive force.[5] 2007 U.S. Dist. App. LEXIS 21573 at *25.

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[5] On the issue of whether Donald Rickard presented a sufficient degree of danger to others to justify the amount of force used as he attempted to flee while shots were being fired into the vehicle, in footnote 6 of their Petition, the Petitioners state that at 16:30-16:51 on Officer Forthman's video camera (which would not be the original time counter contained on the dashboard camera, but is apparently a digital time citation instead), Rickard "almost" hit another car head-on. Respectfully, as part of the ongoing pattern of disputing facts they claim to have conceded for purposes of appeal and as an inherently subjective means of describing an "almost" collision that did not occur, this is not borne out by the video, as a distance measurement between the vehicles is not apparent. A review of the video demonstrates that the other vehicle to which the Petitioners must be referring (the only other vehicle seen in that particular sequence of events) actually slowed down to a virtual standstill while the Rickard vehicle (then out of control most likely because the driver had been shot multiple times) went off to the side of and then past the other vehicle. This particular factual contention brings up the point noted by Justice Scalia in *Scott* from *Vaughan v. Cox*, addressing the "near certainty" of death of a

(Continued on following page)

The factual similarity of *Kirby* and *Murray-Ruhl* to this case (fifteen total shots, the last twelve of which were fired as the vehicle was passing and then beyond the officers) is obvious. Even the number of shots is similar, and the denial of qualified immunity for such a level of force is appropriate.

The above exercise, attempting to compare various cases by their fact patterns, and, to a certain extent, by category ("chase cases" or "ramming cases" versus "shooting cases") illustrates the inherent challenge in attempting to craft a one-size-fits-all rule. The default analysis must necessarily involve some degree of fact specificity, which of course is not a new concept. In fact, that basic notion emanates from and has been reiterated in opinions of this Court. *See, e.g.*, *Scott*, indicating "in the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Scott*, 550 U.S. at 383. However, the ultimate effort of the Petitioners has to be viewed as seeking to convince this Court to accept this appeal for the purpose of adopting and formulating a one-size-fits-all rule. Their rule would presumably be that, as a matter of law, a vehicular chase justifies even as many as fifteen total gunshots at a suspect vehicle, the vast majority of the shots being fired while the vehicle is passing or has already passed the officers. As a matter of degree, this effort must be considered against the backdrop of *Brosseau v. Haugen*, finding just *one*

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suspect from firing into a car, which resulted in a denial of qualified immunity by the Eleventh Circuit in *Vaughan*.

gunshot to stop a suspect from fleeing to be in the "hazy border between excessive and acceptable force."

On this note, a clarification is important: although the Petitioners state at page 21 of their Petition that Brosseau fired "shots" at Haugen from behind out of fear that he might drive menacingly and there might be others in his path, a review of *Brosseau* indicates that just one shot was fired, injuring Haugen but not killing him. That is certainly a far cry from the fifteen shots in this case which did kill both occupants of the vehicle.

Stated more simply, Petitioners appear to be attempting to convince this Court (1) to transfer principles from a body of ramming cases to shooting cases (an approach this Court specifically differentiated in *Scott*, 550 U.S. at 383), and (2) to be prepared to hold as a matter of law that the firing of fifteen shots cannot be constitutionally unreasonable, and that clearly established law would allow a reasonable officer to believe such a level of force would be authorized. Simply put, this would turn both *Tennessee v. Garner* and *Brosseau v. Haugen* on their heads, and goes too far.

The basic analysis on this point is not changed by the Petitioners' citation to *Sykes v. United States*, ___ U.S. ___, 131 S. Ct. 2267, 180 L. Ed. 2d 60 (2011), itself a 2011 case which of course post-dates the events of this case well beyond *Scott*, but which Petitioners nevertheless urge to this Court. *Sykes* addresses whether fleeing may be treated as a violent felony for purposes of sentencing considerations (indicating that

it may). However, it should not be read (as the Petitioners seemingly would have this Court do) as authority for the proposition under Fourth Amendment jurisprudence that vehicular flight creates an automatic justification for the use of virtually unlimited deadly force by police. If that were so, elementary Fourth Amendment principles would be emasculated just because flight occurred. Indeed, taking the fact that Mr. Rickard was fleeing into account, the Sixth Circuit addressed the same basic arguments Petitioners make to this Court based upon *Sykes*:

> Nor does the Supreme Court's decision in *Sykes* compel a different result. *Sykes v. United States*, 131 S.Ct. 2267 (2011). The holding in *Sykes* that vehicular flight from an officer may categorically present "a serious potential risk of physical injury to another" so as to constitute a "violent felony" for purposes of sentencing under 18 U.S.C. § 924(e) addresses a question distinct from whether the force applied – including deadly force – to effect the seizure of a fleeing suspect in a given case was objectively reasonable as a matter of law under the Fourth Amendment.

Pet. App. at 11.

The Sixth Circuit's distinction of *Sykes* is appropriate, particularly to the extent the Petitioners seek to convert the act of fleeing into a carte blanche justification for the use of virtually any level or amount of deadly force to stop a fleeing suspect *because he has fled*. This is closely related to the issue about the disputes which exist as to whether aggravated

assaults occurred. Although the officers claimed assaults occurred, they do not show on the video and the district court so found. On review of the video evidence, the Sixth Circuit could not say the findings of the district court were blatantly and demonstrably false. Pet. App. at 10. However, the Petitioners seek to bootstrap their assertion that such assaults did occur (or their perception that they occurred) into an outright justification for the level of force that was used in this case. Respectfully, to take these factors (the act of fleeing, added to claimed aggravated assaults) and offer them as justifying the level of force used in this case goes too far.

This Court's opinion in *Graham v. Connor*, 490 U.S. 386 (1989), has long been authority for the proposition that courts must balance the nature and quality of the intrusion on the individual's Fourth Amendment rights against the countervailing governmental interests at stake. The Petitioners assert that the Sixth Circuit erred in failing to discuss this balancing, but ignore the fact that the district court, which the Sixth Circuit was affirming under the circumstances of this appeal, addressed the balancing thoroughly. Pet. App. at 32-41. It has long been understood that this necessitates an analysis of the facts and circumstances of each case because the test of reasonableness is not capable of precise definition or mechanical application. *Graham*, 490 U.S. 386, 396. For this reason, an approach denying qualified immunity in the face of genuine and material factual disputes is appropriate in excessive force cases. Invariably, therefore, courts wind up comparing the

facts and circumstances of various cases with the difficulty of attempting to formulate rules from such comparisons. The process is ultimately, as Justice Scalia observed in *Scott*, the navigation of a "fact-bound morass."

Nevertheless, a comparison of the cases does help illustrate ultimately that the Sixth Circuit did properly affirm the district court in denying qualified immunity in this case. From *Tennessee v. Garner* it is clear (and was clear long before the events of this case) that shooting an unarmed suspect dead from behind to prevent the suspect's escape is constitutionally unreasonable. Although this Court found the ramming of a suspect vehicle in a chase constitutionally permissible under the facts present in *Scott v. Harris*, this Court also made clear that shooting a suspect is different from a vehicular ramming. In *Scott*, this Court also noted the near certainty of death likely to result from the firing of shots into a moving suspect vehicle as in *Vaughan, supra*, an opinion of the Eleventh Circuit denying qualified immunity. In *Brosseau v. Haugen*, this Court found that it was permissible under the Fourth Amendment for an officer to fire just one shot (not "shots" as suggested by Petitioners at page 21 of their Petition) at a suspect attempting to flee, because under those circumstances it was within the "hazy border" between acceptable and excessive force.

This case is different, for all of the reasons noted above, and the Sixth Circuit appropriately affirmed the district court's denial of qualified immunity.

The Petition should be denied.

CONCLUSION

This Court should deny the Petition because it depends upon arguments that were not presented to the Sixth Circuit, despite the filing of an initial Petition for Rehearing and then a Modified Petition for Rehearing. This by itself would be ample basis for this Court to deny the Petition.

Beyond the fact that the Petition depends upon new arguments, and beyond the subjective characterizations of facts and events offered by the Petitioners, several principles still stand. The analysis is necessarily fact-based and case-specific, as the collective body of case law demonstrates. That presumably is not going to change and this case would not present this Court with a vehicle for articulating new precedent in that regard. This Court should deny the Petition because there is already case law (*Scott*) indicating the value of video evidence to assess the validity of a defense of qualified immunity. Moreover, this case is not a ramming case like *Scott*. It is a shooting case. With that important distinction in mind, this Court should deny the Petition because it is not necessary to articulate the point that *one* shot fired at a suspect attempting to flee in a vehicle can be constitutionally permissible as being within the hazy border between acceptable and excessive force. This Court's opinion in *Brosseau v. Haugen* is authority for that point under the facts of *Brosseau*, but this

case is very different because of the circumstances and particularly the degree of force used. Presumably this Court is understandably hesitant to develop blanket rules for the "factbound morass" of Fourth Amendment reasonableness cases. Ms. Rickard respectfully submits that this Court should certainly not accept this appeal upon Petitioners' invitation to formulate a blanket rule that fifteen shots would be acceptable force, but that is what Petitioners ask, in effect. Their Petition should be denied.

Respectfully submitted,

Whitne Rickard, a Minor Child, Individually and as Surviving Daughter of Donald Rickard, Deceased, by and through her Mother Samantha Rickard as Parent and Next Friend

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ESTATE OF KELLY A. ALLEN, Deceased; MARIA NICOLE ALLEN, a minor by next friend, Kenneth B. Allen; ALEXIS LANE ALLEN, a minor by next friend, Kenneth B. Allen; CLAYTON DAVID ALLEN

Plaintiffs-Appellees Cross-Appellants

and

WHITNE RICKARD, a Minor Child, Individually and as Surviving Daughter of Donald Rickard, Deceased, by and through her mother Samantha Rickard as Parent and Next Friend

Plaintiff-Appellee

v. **No. 11-5266**

CITY OF WEST MEMPHIS

Defendant

and

VANCE PLUMHOFF, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; JOHN BRYAN GARDNER, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; TONY GALTELLI, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; LANCE ELLIS, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; JIMMY EVANS, Officer, in his

personal and official capacity as a police officer of the West Memphis Police Department; JOSEPH FORTHAM, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department

Defendants – Appellants Cross-Appellees

(Filed Oct. 19, 2012)

DEFENDANTS' PETITION FOR REHEARING OR REHEARING EN BANC OF PANEL OPINION AND JUDGMENT

Come now the Separate Defendants, Officers Galtelli, Gardner, Ellis, Evans, Forthman, and Plumhoff, in their personal and official capacities, by and through counsel, and for their Petition for Rehearing or Rehearing En Banc of Panel Opinion and Judgment, state:

I. Introduction: Statement pursuant to F.R.A.P. 35.

The panel decision conflicts with a decision of the U.S. Supreme Court and prior decisions of the Sixth Circuit Court of Appeals. Specifically, the Panel failed to address the applicability of *Sykes v. United States*, 131 S. Ct. 2267 (2011), which ruled that felony fleeing is a dangerous felony. Thus, under *Graham v. Connor*, this factors into the calculus of a force analysis. The Panel failed to conduct the appropriate force analysis under the Fourth Amendment because it failed to consider the dangerous felony caused by Mr. Rickard during his flight. Rather, the Panel merely described

what Mr. Rickard did as driving away from a lawful traffic stop. That is simply a misapprehension of the undisputed facts below; when considered along with the other *Graham* factors it is clear that the three officers who used deadly force – Officers Plumhoff, Gardner, and Galtelli – did so in an objectively reasonable manner and are entitled to qualified immunity. Further, because qualified immunity for police officers is at issue, this case is one of exceptional importance and must be reviewed by the Panel or the Court *en banc*.

Additionally, the Panel decision conflicts with a prior decision of another Panel of this Court. The Sixth Circuit, confronted with a police shooting case, has noted that when qualified immunity is invoked, it becomes the Plaintiff's burden to prove that a defendant is not entitled to qualified immunity. *Davenport v. Causey,* 521 F.3d 544, 550 (6th Cir. 2007). The Sixth Circuit presumes that qualified immunity ordinarily applies; therefore, the burden is on the Plaintiffs to show that the Defendants are not entitled to qualified immunity. *Chappell v. City of Cleveland,* 585 F.3d 901, 907 (6th Cir. 2009).

The Panel refused to consider the defense of qualified immunity as it applied to three officers who used no force and had no opportunity to intervene given the rapidly escalating events that led to the use of force in this case. Specifically, the undisputed facts as recognized by the Panel demonstrate Officers Ellis, Forthman, and Evans did not use force on Mr. Rickard or the passenger of the Rickard car. Rather,

those officers were merely on the scene and, indeed, both Ellis and Evans were nearly hit by Mr. Rickard's car during his flight. The Panel noted that the Appellants failed to press the Panel to rule on the defense of qualified immunity for each officer individually; however, that was an error of law as it effectively placed the burden improperly on the Appellants. Again, while the Panel's decision conflicts with *Davenport* and *Chappell* above, the failure to properly consider each Appellant's entitlement to qualified immunity involves an issue of exceptional importance which this Court must review.

Finally, the Panel erred in claiming that the Appellants conceded that Tennessee law applied regarding the state law claims and the Appellants' assertion of immunity. Rather, as is clear from Appellants' initial brief, both Arkansas and Tennessee law pertaining to immunity from state torts was argued. Furthermore, irrespective of which State's immunity law applied, an issue of exceptional importance was raised by Appellants. That is, the Appellants argued that because they were in hot pursuit across state lines, the Uniform Law on Fresh Pursuit adopted by both Arkansas and Tennessee should grant the officers in this case immunity from State torts.

Thus, the two bases for rehearing under Fed. R. App. P. 35 are met.

For the purposes of this appeal, in the Appellants' Response to the Plaintiffs' Motion to Dismiss the Appellants conceded the facts as purported by the

Plaintiffs, for purposes of appeal only. Such a concession is a requirement of this Circuit and the Appellants have complied; nonetheless, the Panel appears to have made another error of law in failing to address *Molodawn* [sic] *v. City of Warren,* 578 F.3d 351, 370 (6th Cir. 2009) as it regards the Court's ability to consider the qualified immunity defense when the Appellants agree to concede the facts in the light most favorable to the Appellees for appeal purposes only.

However, the Appellants' version of events does not significantly vary from any other version – by watching the videos and reviewing the undisputed affidavit and deposition testimony provided by the officers in this case, anyone can see for themselves the events that led to the shooting. The Court is in possession of the videos and the Appellants urge the Court en banc to review the videos and the undisputed testimony below and reverse and dismiss the case.

II. Argument

A. The Panel erred In Failing to Consider *Sykes* applicability to the instant case.

The panel improperly found a factual dispute when no dispute to the material facts had been asserted by the Appellants because the Appellants were willing to concede any alleged disputes for the purpose of the appeal. *Moldowan v. City of Warren,* 578 F.3d 351, 370 (6th Cir. 2009). The videos speak for themselves and therefore this Court has jurisdiction

to determine whether a reasonable officer could have acted as the Appellants here acted. If on the basis of the uncontested and incontrovertible facts this Court makes a legal conclusion that the car shown on the videos *did* pose a risk to the officers, then the officers are entitled to qualified immunity.

This Court's ability to resolve any apparent dispute has its roots in the U.S. Supreme Court's 2007 decision of *Scott v. Harris*. *Id.* (citing *Scott v. Harris*, 550 U.S. 372 (2007)). In 2009, this Court wrote:

> In *Scott v. Harris*, however, the Supreme Court recognized an apparent exception to this jurisdictional limitation when it considered and rejected a district court's denial of summary judgment even though the district court had found genuine issues existed as to material facts. In reaching that conclusion, and without addressing the issue of jurisdiction, the Court found that a video of the incident rendered the plaintiff's version *of the facts* 'so utterly discredited by the record that no reasonable jury could have believed him.'

Id. at 371 (internal citation omitted) (emphasis added).

On June 13, 2011, the Appellants notified the Court (via a 28(j) letter) of a newly decided United States Supreme Court case that appears to have particular bearing on this appeal. The decision is *Sykes v. United States*, 131 S. Ct. 2267 (2011). The Supreme Court held that felony fleeing, as defined in

an Indiana statute, is a violent felony. *Id.* at 14. In Arkansas, where the fleeing began, fleeing from the officers in a vehicle in the manner shown on the videos is a felony. Ark. Code Ann. § 5-54-125(d)(2). In Tennessee, where the shooting in this case occurred, fleeing from officers via a motor vehicle is also a felony. Tenn. Code Ann. § 39-16-603(b)(3). The Supreme Court stated:

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator's indifference to these collateral consequences has violent – even lethal – potential for others.

Sykes. at 6.

Based upon the *Sykes* case, that Mr. Rickard was engaged in a violent felony is now a matter of law that is controlling in this case and should have assisted the panel in deciding the appeal. However, this case and its application to the present appeal was not discussed in the panel's opinion. If, by operation of law, the car driven the [sic] manner shown on the videos is deemed a violent felony, then "police

will, in a legitimate and lawful manner . . . use force to bring him within their custody." *Id.* This is a question of law that is answered by viewing the video tapes. Mr. Rickard dangerously fled from a lawful traffic stop; he did not merely drive away as the Panel characterized it. His actions captured on video clearly showed a lack of concern for the safety of property and persons of pedestrians and other drivers. These are not facts in dispute, they are merely facts from which this court has jurisdiction to draw legal conclusions.

Apart from the felony committed by Mr. Rickard's driving, and his actions immediately before he was shot further demonstrates his indifference to the collateral consequences which in fact had violent and even lethal consequences for others. (The front of Rickard's car was in contact with the front of one of the police cars and the video shows, and the Plaintiffs' admit, that although his car was stopped at that moment, his front wheels continued to spin forward – until he put the car in reverse after being shot and pulled off backwards going 180 degrees with officers around him on foot and in cars.) For the panel to fail to address the *Sykes* case demonstrates that its order conflicts with the decision of the Supreme Court. As a result, a rehearing is proper.

Indeed, under *Graham* the first factor articulated is the "severity of the crime at issue." *See Graham*, 490 U.S. at 396. Plaintiffs have alleged that the initial stop was for an inoperable headlight. R. No. 54, *SUMF* ¶¶ 2,7. Officer Forthman's suspicions were

heightened as he initially approached the suspect's vehicle after the stop, because of Rickard's behavior and because Officer Forthman noticed a broken windshield that appeared was possibly caused by a collision with a pedestrian. R. No. 54, *SUMF* ¶¶ 14-16, 18. The video and audio evidence demonstrates the officers perceived felonious aggravated assault and felonious fleeing by the driver against the officers before any force was employed.

The first aggravated assault was on Interstate 40 in Arkansas when officers believed the Plaintiffs' [sic] tried to ram Officer Plumhoff. R. No. 54, *SUMF* ¶ 47. Mere moments later, the Plaintiffs' vehicle can be seen crossing the interstate lanes and almost colliding with Officer Evans' vehicle. R. No. 54, *SUMF* ¶ 53. Officer Evans provided affidavit testimony that this nearly caused him to wreck his patrol car. R. No. 54, *SUMF* ¶ 55. Then as the pursuit was on the Mississippi River bridge, Officer Plumhoff reported that the Honda had committed another aggravated assault against him, when the suspects' vehicle moved dangerously close to his patrol car and almost came into contact with his vehicle. R. No. 54, *SUMF* ¶¶ 64-65. Once in Memphis, Tennessee, the vehicle collided with Officer Plumhoff's vehicle after spinning out into a parking lot. R. No. 54, *SUMF* ¶¶ 82-88. Plumhoff has testified that he believed Rickard turned toward his car and intentionally hit it and the video appears to confirm this account. Moments later, the Honda then accelerated forward and crashed into Officer Gardner's vehicle, where the Honda's tires can

be seen spinning as the Honda rams the police vehicle several times. R. No. 54, *SUMF* ¶¶ 100-102. The Plaintiffs admit in their response to SUMF that the tires of the Honda were spinning at the time Plumhoff began firing. It was also around this time that the Honda may have struck Officer Evans' hand. R. No. 54, *SUMF* ¶ 109. Thus, the driver of the Honda was using it as a deadly weapon, while officers were on foot and in extremely close proximity.

Beyond the aggravated assaults[1] against the officers and felony fleeing, there were other actions by the Plaintiffs that would cause a reasonable officer to think that the Plaintiffs were an immediate threat to the officers' safety as well as a threat to other civilians' safety. The video from Unit #279, Officer Forthman's vehicle, clearly shows that in an attempt to quickly exit off I-40 at Danny Thomas Blvd., the Plaintiff's vehicle dangerously crossed lanes of traffic and turned in front of a vehicle pulling a boat, which caused that vehicle to slam on its brakes. R. No. 54, *SUMF* ¶¶ 69-70. Under *Scott v. Harris,* this fact is weighed heavily in the force calculus. 550 U.S. at 384. The white Honda and its driver,

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[1] Ark. Code Ann. § 5-13-204 (2004) states "(a) A person commits aggravated assault if under circumstances manifesting extreme indifference to the value of human life, he or she purposely:

> (1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person . . . (b) Aggravated assault is a Class D Felony."

Mr. Rickard, indisputably posed a serious immediate threat to the officers and to others based on the numerous attempts to force the officers off the interstate by swerving in front of them while traveling at a high rate of speed, the disregard for the safety of others, including civilians, and colliding with two different police vehicles. It is also indisputable that the events transpired quickly and split-second decision making was required by the West Memphis Police Officers. R. No. 54, *SUMF* ¶ 120. Furthermore, the officers have testified they felt threats to their own lives, the lives of fellow officers, and the public in general immediately prior to any use of force, and the record demonstrates the reasonableness of these fears. R. No. 54, *SUMF* ¶¶ 104-106, 113-114, 116. Further, the Plaintiffs offered no admissible evidence to dispute these fears.

The proper question is: could these officers reasonably conclude probable cause for those offenses occurred? Indisputably Rickard committed dangerous felony fleeing and this was not considered by the Panel in its discussion of the reasonableness of force used. However, under *Graham* this is one of the most relevant considerations and the failure to plug this fact into the force analysis led to an error of law.

Further, the events in the present case provide ample evidence to support the third factor articulated by the Supreme Court that the suspect actively resisted arrest by affirmatively dangerous conduct and flight. *See Graham,* 490 U.S. at 396. In the most astonishing act of defiance, Mr. Rickard, even after

shots were fired, reversed the vehicle onto Jackson Ave. in order to continue his flight from the police, where he almost ran over Officer Lance Ellis, who can be seen quickly moving out of the way. R. No. 54, *SUMF* ¶ 111. In the process, the Honda arguably struck Officer Evan's hand, R. No. 54, *SUMF* ¶ 109, and then almost backed into Officer Ellis. R. No. 54, *SUMF* ¶ 111.

The Panel discussed *Scott v. Harris,* 550 U.S. 372 (2007), and noted the similarity between the facts of that case and the facts of the present case. It correctly stated that the U.S. Supreme Court reversed an earlier denial of qualified immunity under these similar facts. The Panel's opinion seemingly distinguishes this case from *Scott* but failed to explain how these factually similar cases require opposite results. In *Scott,* the fleeing suspects were still driving away from the officers and posed no immediate risk of harm to the officers when the alleged constitutional violation occurred. Here, Mr. Rickard's car was bucking up against one of the police cars with his car's wheels still spinning forward and with officers on foot around his car attempting to restrain him. When he flung his car in reverse, it is clear that there was some immediate risk to the officers on foot. Unlike in *Scott,* in the present case there are not three versions of what happened that night: the plaintiff's; the defendants'; and the video. Here there is one version of the events: the video. Mr. Rickard's actions portrayed on the video at the moment shots were first fired were certainly as dangerous as the actions of the

driver in *Scott,* yet the Panel decided that there was not a requisite degree of danger posed by Mr. Rickard.

The Panel also cited *Austin v. Redford Twp. Police Dep't,* 690 F.3D [sic] 490 (2012) for support of affirming the denial of qualified immunity after reviewing the video of the incident. In *Austin,* the suspect was not resisting and was effectively restrained and that was supported by the video. In that case, you ruled that it is unreasonable to use force on a restrained subject absent some compelling justification. *Austin,* 690 F.3d 490 (2012). Here, there was compelling justification – the same justification present in the *Scott* case.

When viewed from a perspective of a reasonable officer on the scene, the officers' actions were "objectively reasonable" because of the high severity of the crime, suspicious vehicle (inoperable headlight with a broken windshield) plus the numerous aggravated assaults, felony fleeing, the numerous attempts by the driver to injure the officers, and the refusal to submit to police authority, while endangering the citizenry. Any alternatives posed by the Plaintiffs would contradict the video record of the events, and such a version should not be adopted by the Court for the purposes of deciding this appeal. *See Scott v.* Harris, 550 U.S. 372, 380 (2007). *See also Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992); see also, *Williams v. City of Grosse Point Park,* 496 F.3d 482 (6th Cir. 2007); *Scott v. Clay County, Tennessee,* 205 F.3d 867 (6th Cir. 2000). In the *Freland* case, a suspect was shot and killed by police after a high-speed

chase. *Id.* at 344. There, as in the case here, the suspect fled after the police tried to stop the suspect for violating a minor traffic law.

In this case, as a matter of law, the Defendants [sic] actions were "objectively reasonable" and within the standards of the Fourth Amendment. *See Scott v. Clay County,* 205 F. 3d 867, 878 (6th Cir. 2000). Consequently, there was no constitutional violation and the denial of qualified immunity must be reversed.

B. The Panel Failed to Properly Consider the Qualified Immunity Defense Raised by Officers Ellis, Forthman, and Evans.

Additionally, the Panel decision conflicts with a prior decision of another Panel of this Court. The Sixth Circuit, confronted with a police shooting case, has noted that when qualified immunity is invoked, it becomes the Plaintiff's burden to prove that a defendant is not entitled to qualified immunity. *Davenport v. Causey,* 521 F.3d 544, 550 (6th Cir. 2007). Furthermore, the Court held that, in the qualified immunity analysis, it gives a "measure of deference" which "carries great weight" when all parties agree that the events happened rapidly and the officer is required to make split-second decisions. *Id.* at 552. An officer's reasonable, but mistaken, belief regarding the amount of force necessary in a given decision does not make out a constitutional violation simply because it was mistaken. *Id.* The facts are considered

at the time of the events in question, not in hindsight. *Id.* The Sixth Circuit presumes that qualified immunity ordinarily applies; therefore, the burden is on the Plaintiffs to show that the Defendants are not entitled to qualified immunity. *Chappell v. City of Cleveland,* 585 F.3d 901, 907 (6th Cir. 2009).

The Panel refused to consider the defense of qualified immunity as it applied to three officers who used no force and had no opportunity to intervene given the rapidly escalating events that led to the use of force in this case. Specifically, the undisputed facts as recognized by the Panel demonstrate Officers Ellis, Forthman, and Evans did not use force on Mr. Rickard or the passenger of the Rickard car. Rather, those officers were merely on the scene and, indeed, both Ellis and Evans were nearly hit by Mr. Rickard's car during his flight. The Panel noted that the Appellants failed to press the Panel to rule on the defense of qualified immunity for each officer individually; however, that was an error of law as it effectively placed the burden on the Appellants where prior Panels of this Court have held that the burden is on the Plaintiff to show that officers are not entitled to qualified immunity. Thus, in the least these three officers were entitled to qualified immunity.

D. The Panel Erred as a Matter of Law Regarding Appellants' State Immunity Defenses.

First, contrary to the statement in the Panel's opinion that the Appellants conceded Tennessee law

applied, the Appellants did in fact argue their entitlement to immunity under Ark. Code Ann. § 21-9-301. App. Brief, pp. 23-24. Thus, the Panel committed an error of law and the Appellants' argument that they were entitled to immunity at least from state law negligence claims pursuant to Arkansas law must be addressed.

Further, the Appellants are alternatively entitled to state law immunity under Tennessee law and the Panel erred in finding otherwise. The Tennessee Governmental Tort Liability Act (hereinafter TGTLA), Tenn. Code Ann. §29-20-101 et seq., establishes that local government entities have immunity for certain acts of its employees except when the General Assembly explicitly retains liability. *Sallee v. Barrett,* 171 S.W.3d 822, 826 (Tenn. 2005). Specifically, TGTLA states:

> Immunity from suit of all governmental entities is **removed** for injury proximately caused by a negligent act or omission of any employee within the scope of his employment **except** if the injury arises out of: [*inter alia*]
>
> (2) false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;

Tenn. Code Ann. §29-20-205 (emphasis added)

The Appellants should have been granted immunity pursuant to the Interstate Fresh Pursuit Act, known in Tennessee as the "Uniform Law on Fresh Pursuit," in conjunction with Ark. Code Ann. § 21-9-301 and Tenn. Code Ann. § 29-20-205. Tenn. Code Ann. § 40-7-201. This act offers protection to officers pursuing "a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed." Tenn. Code Ann. § 40-7-202. The Tennessee Uniform Law on Fresh Pursuit expressly gave these Arkansas police officers the same authority as a Tennessee officer when in fresh pursuit of a person "who is believed to have committed a felony" in Arkansas. Tenn. Code Ann. § 40-7-203. As noted above, Mr. Rickard's actions captured on the videos were reasonable grounds for believing he was feloniously fleeing in Arkansas and in Tennessee. This is exactly the situation that such laws are designed for. As such, the officers are entitled to the same immunity as would a Tennessee policeman. If that were not the case, there is no reason to have such a uniform law enacted throughout the entire nation and the Appellants would merely be private citizens, which is contrary to the policy of the Fresh Pursuit Act.

IV. Conclusion

The officers in this case acted objectively reasonably and are entitled to qualified immunity.

Respectfully submitted,

Vance Plumhoff, Tony Galtelli, John Gardner, Lance Ellis, Jimmy Evans, Joseph Forthman, in their individual capacities
SEPARATE DEFENDANTS

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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ESTATE OF KELLY A. ALLEN, Deceased; MARIA NICOLE ALLEN, a minor by next friend, Kenneth B. Allen; ALEXIS LANE ALLEN, a minor by next friend, Kenneth B. Allen; CLAYTON DAVID ALLEN

Plaintiffs-Appellees Cross-Appellants

and

WHITNE RICKARD, a Minor Child, Individually and as Surviving Daughter of Donald Rickard, Deceased, by and through her mother Samantha Rickard as Parent and Next Friend

Plaintiff-Appellee

v. **No. 11-5266**

CITY OF WEST MEMPHIS

Defendant

and

VANCE PLUMHOFF, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; JOHN BRYAN GARDNER, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; TONY GALTELLI, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; LANCE ELLIS, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department; JIMMY EVANS, Officer, in his

personal and official capacity as a police officer of the West Memphis Police Department; JOSEPH FORTHAM, Officer, in his personal and official capacity as a police officer of the West Memphis Police Department

Defendants – Appellants Cross-Appellees

(Filed Nov. 15, 2012)

DEFENDANTS' MODIFIED PETITION FOR REHEARING EN BANC OF AMENDED PANEL OPINION AND JUDGMENT

Come now the Separate Defendants, Officers Galtelli, Gardner, Ellis, Evans, Forthman, and Plumhoff, in their personal and official capacities, by and through counsel, and for their Modified Petition for Rehearing En Banc of Amended Panel Opinion and Judgment, state:

I. Introduction: Statement pursuant to F.R.A.P. 35.

The amended panel decision[1] conflicts with a decision of the U.S. Supreme Court and prior decisions of the Sixth Circuit Court of Appeals. Specifically, the Panel has still failed to apply *Sykes v. United States,* 131 S. Ct. 2267 (2011), which ruled that felony fleeing is a dangerous felony, to the facts of this case

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[1] 6 Cir. I.O.P. 35(d) permits a party to modify within 14 days, its petition for rehearing after the Panel changes its decision, or to file a new petition. Appellants herein have chosen to modify their petition following the Panel's Amended Opinion.

in the proper force analysis under *Graham v. Connor*, 490 U.S. 386 (1989). In the amended opinion, the Panel has still failed to conduct the appropriate force analysis because it failed to consider the severity of the crime at issue along with the other *Graham* factors and the undisputed video and affidavit evidence. The police "are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary." *Id.* at 397. In this case, the Appellants respectfully submit that there were no legitimate or material factual disputes below and the Panel and the District Court have impermissibly employed 20/20 hindsight to a rapidly evolving, dangerous set of circumstances caused by Mr. Rickard and the Appellants are entitled to qualified immunity.

The United States Supreme Court found felony fleeing is a dangerous felony; here that was exhibited by Mr. Rickard during his flight and must be plugged into the force calculus as it represents the severity of the crime at issue. The Panel merely described what Mr. Rickard did as driving away from a lawful traffic stop. That is simply a misapprehension of the undisputed facts below; when considered along with the other *Graham* factors it is clear that the three officers who used deadly force – Plumhoff, Gardner, and Galtelli – did so in an objectively reasonable manner. Further, because qualified immunity for police officers is at issue, this case is one of exceptional importance and must be reviewed by the Court *en banc*.

Additionally, the amended Panel decision conflicts with a prior decision of another Panel of this Court. The Sixth Circuit, confronted with a police shooting case, has noted that when qualified immunity is invoked, it becomes the Plaintiff's burden to prove that a defendant is not entitled to qualified immunity. *Davenport v. Causey,* 521 F.3d 544, 550 (6th Cir. 2007). The Sixth Circuit presumes that qualified immunity ordinarily applies; therefore, the burden is on the Plaintiffs to show that the Defendants are not entitled to qualified immunity. *Chappell v. City of Cleveland,* 585 F.3d 901, 907 (6th Cir. 2009).

The Panel has still refused to consider the defense of qualified immunity raised by three officers who used no force and had no opportunity to intervene given the rapidly escalating events. Specifically, the undisputed facts as recognized by the Panel demonstrate Officers Ellis, Forthman, and Evans did not use force on Mr. Rickard or the passenger. Rather, those officers were merely on the scene and, indeed, both Ellis and Evans were nearly hit by Mr. Rickard's car during his flight. The Panel noted that the Appellants failed to press the Panel to rule on the defense of qualified immunity for each officer individually; however, that was an error of law as it effectively placed the burden improperly on the Appellants. Further, those Appellants have consistently interposed the defense of qualified immunity at the District Court level (R. 54-1, pp. 7, 10, 14, 20-25) and on appeal, and very thoroughly described the

undisputed facts demonstrating three officers used deadly force and three did not, and it was the Plaintiffs burden to demonstrate each was not entitled to qualified immunity.

While the Panel amended its opinion, including a footnote regarding this issue, and the concurrence addresses this issue, neither addresses *Davenport* or *Chappell* and the Appellants argument herein. Again, while the Panel's decision conflicts with *Davenport* and *Chappell* above, the failure to properly consider each Appellant's entitlement to qualified immunity involves an issue of exceptional importance.

Finally, the Panel erred in claiming that the Appellants conceded that Tennessee law applied regarding the state law claims and the Appellants' assertion of immunity. Rather, both Arkansas and Tennessee law pertaining to immunity from state torts was argued. Furthermore, irrespective of which State's immunity law applied, an issue of exceptional importance was raised by Appellants. That is, the Appellants argued that because they were in hot pursuit across state lines, the Uniform Law on Fresh Pursuit adopted by both Arkansas and Tennessee should grant the officers in this case immunity from State torts. Thus, the two bases for rehearing under Fed. R. App. P. 35 are met.

For the purposes of this appeal only, the Appellants conceded the facts as purported by the Plaintiffs. Such a concession is a requirement of this

Circuit and the Appellants have complied; nonetheless, the Panel appears to have made another error of law in failing to address *Molodawn v. City of Warren,* 578 F.3d 351, 370 (6th Cir. 2009) regarding an undisputed factual record.

However, the Appellants' version of events does not significantly vary from any other version – by watching the videos and reviewing the undisputed affidavit and deposition testimony provided by the officers in this case, anyone can see for themselves the events that led to the shooting. The Court is in possession of the videos and the Appellants urge the Court *en banc* to review the videos and the undisputed testimony below and reverse and dismiss the case.

II. Argument

A. Appellants' actions were reasonable based on controlling case law

This Court's ability to resolve this case is based on the U.S. Supreme Court's 2007 decision of *Scott v. Harris. Id.* (citing *Scott v. Harris,* 550 U.S. 372 (2007)). In 2009, this Court wrote:

> In *Scott v. Harris,* however, the Supreme Court recognized an apparent exception to this jurisdictional limitation when it considered and rejected a district court's denial of summary judgment even though the district court had found genuine issues existed as to material facts. In reaching that conclusion, and without addressing the issue of

> jurisdiction, the Court found that a video of the incident rendered the plaintiff's version *of the facts* 'so utterly discredited by the record that no reasonable jury could have believed him.'

Id. at 371 (internal citation omitted) (emphasis added).

The Panel recognized that *Scott* was factually similar, on the one hand, but that details made this case distinguishable. However, the Panel's factual distinctions between the cases result from improperly characterizing what is shown on the videos. The Panel states, "In our case, the fleeing vehicle was essentially stopped and surrounded by police officers and cars although some effort to elude capture was still being made." Mr. Rickard was not "essentially stopped" in the sense that the pursuit had ended. He had not given himself up to the police. At the time the first shots were fired, the video shows his car violently bucking against one of police cars with its tires spinning freely. Immediately after the first shots he continued his escape. He was never "captured" by the police, despite the valiant efforts shown on the video. Mr. Rickard's car may have been impeded momentarily, but the video shows that his dangerous conduct never stopped. The three officers who used deadly force did so in a tense, rapidly evolving situation where Mr. Rickard was using his car as a deadly weapon. The difference in speed exhibited by Mr. Rickard as he rams a police car and almost runs over Officer Ellis as compared to *Scott* does not make

Rickard's car less deadly and the undisputed facts compel one conclusion: the Appellants' actions were reasonable.

B. The Panel erred in failing to consider *Sykes* applicability to the instant case.

The decision in *Sykes v. United States,* 131 S. Ct. 2267 (2011) has particular bearing on this case. The Supreme Court held that felony fleeing, as defined in an Indiana statute, is a violent felony. *Id.* at 14. In Arkansas, where the fleeing began, fleeing from the officers in a vehicle in the manner shown on the videos is a felony. Ark. Code Ann. § 5-54-125(d)(2). In Tennessee, where the shooting in this case occurred, fleeing from officers via a motor vehicle is also a felony. Tenn. Code Ann. § 39-16-603(b)(3). The Supreme Court stated:

> When a perpetrator defies a law enforcement command by fleeing in a car, the determination to elude capture makes a lack of concern for the safety of property and persons of pedestrians and other drivers an inherent part of the offense. Even if the criminal attempting to elude capture drives without going at full speed or going the wrong way, he creates the possibility that police will, in a legitimate and lawful manner, exceed or almost match his speed or use force to bring him within their custody. A perpetrator's indifference to

> these collateral consequences has violent – even lethal – potential for others.

Sykes. at 6.

Based upon *Sykes*, that Mr. Rickard was engaged in a violent felony is now a matter of law that is controlling in this case. However, *Sykes* and its application to the present appeal were not discussed in the panel's original opinion. Even after amending the opinion to address *Sykes*, the Panel has failed to discuss *Sykes'* application under the *Graham* factors as it represents in this case the severity of the crime at issue. If, by operation of law, the car driven the manner shown on the videos is deemed a violent felony, then "police will, in a legitimate and lawful manner . . . use force to bring him within their custody." *Id.* This is a question of law that is answered by viewing the video tapes and reviewing the undisputed testimony below. Mr. Rickard dangerously fled from a lawful traffic stop; he did not merely drive away as the Panel characterized it. His actions captured on video clearly showed a lack of concern for the safety of property and persons of pedestrians and other drivers. These are not facts in dispute; they are merely facts from which this court has jurisdiction to draw legal conclusions.

Apart from the felony committed by Mr. Rickard's driving, his actions immediately before he was shot further demonstrates his indifference to the collateral consequences which in fact had violent and even lethal consequences for others. (The front of Rickard's

car was in contact with the front of one of the police cars and the video shows, and the Plaintiffs' admit, that although his car was stopped at that moment, his front wheels continued to spin forward – until he put the car in reverse after being shot and pulled off backwards going 180 degrees with officers around him on foot and in cars.) The Panel's failure to address the *Sykes* case as representing an important *Graham* factor – the severity of the crime at issue – demonstrates that its order conflicts with the decision of the Supreme Court. As a result, a rehearing *en banc* is proper.

Indeed, under *Graham* the first factor articulated is the "severity of the crime at issue." *See Graham,* 490 U.S. at 396. Plaintiffs have alleged that the initial stop was for an inoperable headlight. R. No. 54, *SUMF* ¶¶ 2,7. Officer Forthman's suspicions were heightened as he initially approached the suspect's vehicle because of Rickard's behavior and because Forthman noticed a broken windshield that appeared was possibly caused by a collision with a pedestrian. R. No. 54, *SUMF* ¶¶ 14-16, 18. The video and audio evidence demonstrates the officers perceived felonious aggravated assault and felonious fleeing by the driver against the officers before any force was employed.

The first aggravated assault was on Interstate 40 in Arkansas when officers believed the Plaintiffs' [sic] tried to ram Officer Plumhoff. R. No. 54, *SUMF* ¶ 47. Moments later, the Plaintiffs' vehicle can be seen crossing the interstate lanes and almost colliding

with Officer Evans' vehicle. R. No. 54, *SUMF* ¶ 53. Officer Evans provided affidavit testimony that this nearly caused him to wreck. R. No. 54, *SUMF* ¶ 55. On the Mississippi River bridge, Officer Plumhoff reported that the Honda had committed another aggravated assault against him, when the suspects' vehicle moved dangerously close to his patrol car and almost struck it. R. No. 54, *SUMF* ¶¶ 64-65. Once in Memphis, Tennessee, the vehicle collided with Officer Plumhoff's vehicle after spinning out into a parking lot. R. No. 54, *SUMF* ¶¶ 82-88. Plumhoff has testified that he believed Rickard turned toward his car and intentionally hit it and the video confirms this account. Moments later, the Honda then accelerated forward and crashed into Officer Gardner's vehicle, where the Honda's tires can be seen spinning as the Honda rams the police vehicle several times, which Plaintiffs admitted below. R. No. 54, *SUMF* ¶¶ 100-102. It was also around this time that the Honda may have struck Officer Evans' hand. R. No. 54, *SUMF* ¶ 109. Thus, the driver of the Honda was using it as a deadly weapon, while officers were on foot and in extremely close proximity.

Beyond the aggravated assaults[2] against the officers and felony fleeing, there were other actions by

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[2] Ark. Code Ann. § 5-13-204 (2004) states "(a) A person commits aggravated assault if under circumstances manifesting extreme indifference to the value of human life, he or she purposely: (1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person . . . (b) Aggravated assault is a Class D Felony."

the Plaintiffs that would cause a reasonable officer to think an immediate threat to the officers' safety and civilians' safety existed. The video from Unit #279, Officer Forthman's vehicle, clearly shows that in an attempt to quickly exit off I-40 at Danny Thomas Blvd., the Plaintiffs vehicle dangerously crossed lanes of traffic and turned in front of a vehicle pulling a boat, which caused that vehicle to slam on its brakes. R. No. 54, *SUMF* ¶¶ 69-70. Under *Scott v. Harris,* this fact is weighed heavily in the force calculus. 550 U.S. at 384. Mr. Rickard indisputably posed a serious immediate threat to the officers and to others.

It is also indisputable that the events were rapidly evolving. R. No. 54, *SUMF* ¶ 120. Furthermore, the officers have testified they felt threats to their own lives, the lives of fellow officers, and the public in general immediately prior to any use of force. R. No. 54, *SUMF* ¶¶ 104-106, 113-114, 116. The Plaintiffs offered no admissible evidence to dispute these fears.

The proper question is: could these officers reasonably conclude probable cause for those offenses occurred? Indisputably Rickard committed dangerous felony fleeing and this was not considered by the Panel in its discussion of the reasonableness of force used. However, under *Graham* this is one of the most relevant considerations.

Further, the events in the present case provide ample evidence to support the third factor articulated by the Supreme Court that the suspect actively

resisted arrest by affirmatively dangerous conduct and flight. *See Graham,* 490 U.S. at 396. In the most astonishing act of defiance, Mr. Rickard, even after shots were fired, reversed the vehicle onto Jackson Ave. in order to continue his flight from the police, where he almost ran over Officer Lance Ellis, who can be seen quickly moving out of the way. R. No. 54, *SUMF* ¶ 111. In the process, the Honda arguably struck Officer Evan's hand, R. No. 54, *SUMF* ¶ 109, and then almost backed into Officer Ellis. R. No. 54, *SUMF* ¶ 111.

The Panel discussed *Scott v. Harris,* 550 U.S. 372 (2007), and noted the similarity between the facts of that case and the facts of the present case. It correctly stated that the U.S. Supreme Court reversed an earlier denial of qualified immunity under these similar facts. The Panel's opinion seemingly distinguishes this case from *Scott* but failed to explain how these factually similar cases require opposite results. In *Scott,* the fleeing suspects were still driving away from the officers and posed no immediate risk of harm to the officers when the alleged constitutional violation occurred. Here, Mr. Rickard's car was bucking up against one of the police cars with his car's wheels still spinning forward and with officers on foot around his car attempting to restrain him. When he flung his car in reverse, it is clear that there was some immediate risk to the officers on foot. Mr. Rickard's actions portrayed on the video at the moment shots were first fired were certainly as dangerous as the actions of the driver in *Scott,* yet the Panel

decided that there was not a requisite degree of danger posed by Mr. Rickard.

The Panel also cited *Austin v. Redford Twp. Police Dep't*, 690 F.3D 490 (2012) for support of affirming the denial of qualified immunity after reviewing the video of the incident. In *Austin,* the suspect was not resisting and was effectively restrained and that was supported by the video. In that case, the court ruled that it is unreasonable to use force on a restrained subject absent some compelling justification. *Austin,* 690 F.3d 490 (2012). Here, there was compelling justification – the same justification present in the *Scott* case.

When viewed from a perspective of a reasonable officer on the scene, the officers' actions were "objectively reasonable" because of the high severity of the crime, suspicious vehicle (inoperable headlight with a broken windshield) plus the numerous aggravated assaults, felony fleeing, the numerous attempts by the driver to injure the officers, and the refusal to submit to police authority, while endangering the citizenry. Any alternatives posed by the Plaintiffs would contradict the video record of the events, and such a version should not be adopted by the Court for the purposes of deciding this appeal. *See Scott v.* Harris, 550 U.S. 372, 380 (2007). *See also Smith v. Freland,* 954 F.2d 343 (6th Cir. 1992); see also, *Williams v. City of Grosse Point Park,* 496 F.3d 482 (6th Cir. 2007); *Scott v. Clay County, Tennessee,* 205 F.3d 867 (6th Cir. 2000). In the *Freland* case, a suspect was shot and killed by police after a high-speed chase.

Id. at 344. There, as in this case, the suspect fled after the police tried to stop the suspect for violating a minor traffic law.

In this case, as a matter of law, the Defendants actions were "objectively reasonable" and within the standards of the Fourth Amendment. *See Scott v. Clay County,* 205 F. 3d 867, 878 (6th Cir. 2000). Consequently, there was no constitutional violation and the denial of qualified immunity must be reversed.

C. The Panel failed to properly consider the qualified immunity defense raised by Officers Ellis, Forthman, and Evans.

Additionally, the Panel decision conflicts with a prior decision of another Panel of this Court. The Sixth Circuit, confronted with a police shooting case, has noted that when qualified immunity is invoked, it becomes the Plaintiff's burden to prove that a defendant is not entitled to qualified immunity. *Davenport v. Causey,* 521 F.3d 544, 550 (6th Cir. 2007). Furthermore, the Court held that, in the qualified immunity analysis, it gives a "measure of deference" which "carries great weight" when all parties agree that the events happened rapidly and the officer is required to make split-second decisions. *Id.* at 552. The Sixth Circuit presumes that qualified immunity ordinarily applies; therefore, the burden is on the Plaintiffs to show that the Defendants are not entitled

to qualified immunity. *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009).

The Panel refused to evaluate, even in the amended opinion, the defense of qualified immunity as it applied to three officers who indisputably used no force and had no opportunity to intervene given the rapidly escalating events that led to the use of force. Specifically, the Panel recognized that Officers Ellis, Forthman, and Evans did not use force on Mr. Rickard or the passenger. The Panel noted that the Appellants failed to press the Panel to rule on the defense of qualified immunity for each officer individually; however, that was an error of law as it effectively placed the burden on the Appellants where prior Panels of this Court have held that the burden is on the Plaintiff to show that officers are not entitled to qualified immunity. Thus, in the least these three officers were entitled to qualified immunity and have interposed the defense from the outset of this case.

D. The Panel erred as a matter of law regarding Appellants' state immunity defenses.

First, contrary to the Panel's opinion, the Appellants did in fact argue their entitlement to immunity under Ark. Code Ann. § 21-9-301. App. Brief, pp. 23-24. Thus, the Panel committed an error of law and the Appellants' argument that they were entitled to immunity at least from state law negligence claims pursuant to Arkansas law must be addressed.

Further, the Appellants are alternatively entitled to state law immunity under Tennessee law. The Tennessee Governmental Tort Liability Act (hereinafter TGTLA), Tenn. Code Ann. §29-20-101 et seq., establishes that local government entities have immunity for certain acts of its employees except when the General Assembly explicitly retains liability. *Sallee v. Barrett,* 171 S.W.3d 822, 826 (Tenn. 2005). Specifically, TGTLA states:

> Immunity from suit of all governmental entities is **removed** for injury proximately caused by a negligent act or omission of any employee within the scope of his employment **except** if the injury arises out of: [*inter alia*]
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> (2) false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;

Tenn. Code Ann. §29-20-205 (emphasis added)

The Appellants should have been granted immunity pursuant to the Interstate Fresh Pursuit Act, known in Tennessee as the "Uniform Law on Fresh Pursuit," in conjunction with Ark. Code Ann. § 21-9-301 and Tenn. Code Ann. § 29-20-205. Tenn. Code Ann. § 40-7-201. This act offers protection to officers pursuing "a person suspected of having committed a supposed felony, though no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed." Tenn. Code Ann.

§ 40-7-202. The Tennessee Uniform Law on Fresh Pursuit expressly gave these Arkansas police officers the same authority as a Tennessee officer when in fresh pursuit of a person "who is believed to have committed a felony" in Arkansas. Tenn. Code Ann. § 40-7-203. Mr. Rickard committed felony fleeing in Arkansas and in Tennessee. As such, the officers should be entitled to the same immunity as would a Tennessee policeman. If that were not the case, there is no reason to have such a uniform law enacted throughout the entire nation and the Appellants would merely be private citizens, which is contrary to the policy of the Fresh Pursuit Act.

Respectfully submitted,

Vance Plumhoff, Tony Galtelli, John Gardner, Lance Ellis, Jimmy Evans, Joseph Forthman, in their individual capacities
SEPARATE DEFENDANTS

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REPLY BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
AUG 21 2013
OFFICE OF THE CLERK

No. 12-1117

In The
Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF

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RULE:

Supreme Court Rule 15.6 1

Petitioners file this brief pursuant to Supreme Court Rule 15.6 to reply to Respondent's brief. For the reasons provided, this Court should either reverse the Sixth Circuit's opinion summarily or grant the Petition for plenary review of the merits.

INTRODUCTION

Petitioners present two questions: whether the Sixth Circuit erred in denying qualified immunity without considering whether Petitioners violated "clearly established law"; and whether the Sixth Circuit erred by not finding the use of force was reasonable under the Fourth Amendment as a matter of law.

The gravamen of Petitioners' argument on the first question is that the circuit court distinguished the facts "in the details" from force ruled permissible three years later in *Scott v. Harris*, 550 U.S. 372 (2007) (Pet. App. at 8-9), thereby ignoring whether the force was clearly *un*reasonable under *pre-existing* law. Tellingly, Respondent argues simply that "the right to be free of excessive force was clearly established." (Resp. Opp. at 9.) Respondent's reliance on this broadly articulated right flies in the face of repeated admonitions that qualified immunity may not be denied based on case law that is "cast at a high level of generality." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). The absence of any analysis of "clearly established law" by the Sixth Circuit is egregious, warranting review by this Court.

On the second question, Respondent seeks to distinguish firing shots used from the vehicle ramming ruled permissible in *Scott* and attempts to align the facts with court decisions where no threat of physical harm was presented. (Resp. Br. at 21-23.) Police officers, however, are accorded broad discretion to employ force that is objectively reasonable in light of the risk of harm they are confronting. Petitioners urge this Court to uphold their use of force under the circumstances presented.

ARGUMENT

A. The Sixth Circuit erred in analyzing whether the force was supported by subsequent case law as opposed to prohibited by clearly established law at the time the force was used

1. A general right to be free from excessive use force is not a "clearly established" right sufficient to overcome qualified immunity

At its heart, qualified immunity is intended "to avoid 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). Consistent with this purpose, public officials must be

shown to have violated "clearly established law" so that "officials can reasonably anticipate when their conduct may give rise to liability for damages." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). Time and again, this Court has instructed that the evaluation "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Given the underpinnings of qualified immunity, it is troubling that *the term "clearly established" is nowhere to be found in the Sixth Circuit's qualified immunity discussion*. Instead, the Sixth Circuit denied qualified immunity finding that "we cannot conclude that the officers' conduct was reasonable as a matter of law." (Pet. App. at 10.) In so ruling, the circuit court conflated the reasonableness of force under the Fourth Amendment with the question of whether the law was clearly established for qualified immunity purposes. This analysis directly contravenes this Court's teaching that "if the plaintiff has satisfied [the] first step [of showing a constitutional violation], the court *must* decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (emphasis added).

The correct standard – never even articulated by the Sixth Circuit – is whether the right was "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093. In the Fourth Amendment use of force context, this Court has explained that

"'[w]hen we look at decisions such as *[Tennessee v.] Garner*[, 471 U.S. 1 (1985)] and *Graham* [*v. Connor*, 490 U.S. 386 (1989)], we see some tests to guide us in determining the law in many different kinds of circumstances; but we do not see the kind of clear law (clear answers) that would apply' to the situation at hand." *Brosseau*, 543 U.S. at 199. *Brosseau* then held that "[t]he present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision." *Id.*

By concluding that the force was not clearly reasonable based on distinctions from *Scott*, the Sixth Circuit shirked its obligation to identify the "clearly established" law that Petitioners allegedly violated in July 2004, three years before *Scott* was decided. Respondent's reliance on a general right to be free of excessive force cannot whitewash the injustice inherent in the analysis. Likewise, Respondent's argument that qualified immunity must be denied unless the force was "clearly reasonable" is misguided. (Resp. Br. at 13.) To the contrary, qualified immunity must be upheld unless the force was clearly established as *un*reasonable at the time the force was used. Because Respondent has not identified a violation of clearly established law, Petitioners have immunity from being sued.

2. Qualified immunity should have been upheld given the similarities with the uses of force in *Brosseau* and in *Scott*

Respondent contends that the force used in this case is distinguishable from *Brosseau* and *Scott*, both of which were decided *after* the events in this case in July 2004. Respondent suggests that Petitioners are being inconsistent by contending that the Sixth Circuit erred in relying on *distinctions* from *Scott* to deny qualified immunity while at the same time showing *similarities* with the force ruled reasonable in *Scott*. (Resp. Br. at 15.) In so urging, Respondent overlooks that if the facts are at all similar to subsequent cases that upheld qualified immunity, then Petitioners' use of force could not have been clearly unconstitutional when the force was used.

a. Similarities to *Scott*

The Sixth Circuit acknowledged "the similarity of the facts here to the facts in *Scott*," (Pet. App. at 8), where this Court found the governmental interest in protecting the public outweighed the "risk of serious injury or death" to the fleeing motorist. 550 U.S. at 386. As in this case, the fleeing motorist led police officers on an extended pursuit through traffic and at excessive rates of speed, refusing all efforts of capture and striking a police vehicle as part of the ongoing effort to elude capture. The officer in *Scott* rammed the fleeing motorist's vehicle at a point where "it was not threatening any other vehicles or pedestrians." 550 U.S. at 380 n.7. In this case, the shots were fired

as Respondent's decedent was about to race off having backed up his vehicle abruptly while officers were on foot imploring him to stop. As the Sixth Circuit noted, "[Petitioner] Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle." (Pet. App. at 6 (quoting Pet. App. at 24).)

Respondent urges, nevertheless, that *Scott* should not apply because firing shots is deadlier than ramming a vehicle. In support, Respondent urges this Court to follow the Sixth Circuit's lead in dismissing *Sykes v. United States*, 131 S. Ct. 2267 (2011), where this Court recognized that vehicles are dangerous instrumentalities. (Resp. Br. at 27-28.) *Sykes*, however, simply acknowledged that "[i]t is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others." 131 S. Ct. at 2274. Respondent would have this Court ignore that common knowledge because it was expressed in a criminal case and not one involving the reasonableness of force in the Fourth Amendment context.

Respondent would further have this Court ignore its finding in *Brosseau* that driving could present an "imminent threat of serious physical harm to innocent motorists as well as to the officers themselves." 543 U.S. at 200; *see also id.* (stating that "a car can be a deadly weapon"). Moreover, *Scott* itself notes that the same holding applies "[w]hether or not Scott's actions constituted application of 'deadly force.'" 550 U.S. at 383. Indeed, ramming a vehicle could in some

instances be more likely to cause harm than bullets that have a smaller target and often go astray.

In sum, courts should be loath to second guess split-second decisions made with respect to force. *See Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). Respondent's attempt to differentiate *Scott* confirms that Petitioners' use of force was not clearly unconstitutional in July 2004.

b. Similarities to *Brosseau*

Respondent's attempt to differentiate the cases based on the type of force used is foreclosed further by *Brosseau*, where the officer discharged her weapon because she feared for the safety of "officers who she *believed* were in the immediate area, and for the occupied vehicles in Haugen's path and for any other citizens who *might* be in the area." 543 U.S. at 196 (emphasis added) (punctuation and internal quotation marks omitted). The suspect in that case had not yet driven the vehicle but the officer believed he would be a menace based on his conduct during a preceding foot chase. This Court found that firing the weapon was not a violation of clearly established law under the circumstances such that the officer was entitled to qualified immunity.

Petitioners' concerns are at least as compelling as those of Officer Brosseau, and likely more so. Whereas

the fleeing suspect in *Brosseau* had not yet driven the vehicle when the officer discharged her weapon, Rickard had led Petitioners on an extended high-speed pursuit, had collided with a police vehicle, and had swerved his vehicle in reverse forcing Petitioner Ellis to jump out of the way when the shots were fired. Also, whereas Officer Brosseau merely thought officers and citizens *might* be in the suspect's path, Petitioners were on foot around Rickard's vehicle when he was attempting to elude capture.

Respondent essentially asks this Court to draw a constitutional line between the shot fired by Officer Brosseau and the shots fired by multiple officers in this case. Because *Brosseau* was based on the "clearly established" prong of the inquiry only, it could not have drawn a substantive constitutional line. If *Brosseau* did draw such a line, it did so after the events in this case and therefore could not have established the law to guide Petitioners. Further, more than one officer discharged a weapon in this case, in contrast to the lone officer in *Brosseau*. (Pet. App. at 5-6.) Moreover, does Respondent suggest that the Constitution forbids an officer from firing more than one shot? And what about Petitioners Ellis, Evans, and Forthman, who fired no shots at all? These questions demonstrate the incongruity of Respondent's positions and confirm the need for substantive review by this Court.

B. The Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law

"In judging whether [the officers'] actions were reasonable [under the Fourth Amendment], we must consider the risk of bodily harm that [the officers'] actions posed to respondent in light of the threat to the public that [the officers were] trying to eliminate." *Scott*, 550 U.S. at 383. The Sixth Circuit mis-stated this test as "the degree of danger that the officers were placed in as a result of Rickard's alleged conduct." (Pet. App. at 10.) Even under that more restrictive test, firearms were not used until after there had been an extended high-speed pursuit that involved a collision with a police vehicle and when Petitioners were on foot adjacent to Rickard's vehicle, at least one of whom had to jump out of harm's way. Moreover, the relative culpability of the people at risk of harm is relevant to the test. *Scott*, 550 U.S. at 384. In that respect, as in *Scott*, it was the suspect who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight. Also as in *Scott*, the suspect was pursued by multiple police officers pleading with him to stop. By contrast, those who might have been harmed had Petitioners not taken the action they did were entirely innocent. As in *Scott*, the Sixth Circuit should have had little difficulty concluding the force was objectively reasonable as a matter of law.

CONCLUSION

Petitioners believe the Sixth Circuit's analysis is so clearly flawed that the denial of qualified immunity can be reversed summarily. Alternatively, Petitioners request that the petition be granted to allow for full consideration on the merits. Petitioners emphasize that "[q]ualified immunity is an immunity from suit and not a mere defense to liability." *Pearson*, 555 U.S. at 237 (internal quotation marks omitted). Absent review by this Court, Petitioners will be harmed irreparably and the analytical errors in the circuit court's opinion will continue to be precedent in the Sixth Circuit.

Respectfully submitted,

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JOINT APPENDIX

SUPREME COURT, U.S.
FILED
DEC 30 2013
OFFICE OF THE CLERK

No. 12-1117

In The Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX VOLUME I

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Petition For Certiorari Filed March 12, 2013
Certiorari Granted November 15, 2013

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Police Pursuit Policy, Exhibit C to Rickard's Response in Opposition to Motion for Summary Judgment, Dist. Ct. Dkt. No. 61-3 (filed 1/25/10) 398

Deadly Force Policy, Exhibit D to Rickard's Response in Opposition to Motion for Summary Judgment, Dist. Ct. Dkt. No. 61-4 (filed 1/25/10) 408

Rickard's Response to Defendants' Statement of Undisputed Material Facts, Dist. Ct. Dkt. No. 61-5 (filed 1/25/10) 416

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The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for Writ of Certiorari:

Opinion of the United States Court of Appeals for the Sixth Circuit, dated November 14, 2012 ..... App. 1

Opinion of the United States District Court for the Western District of Tennessee, dated January 19, 2011 ..... App. 16

Order of the United States Court of Appeals for the Sixth Circuit denying petition for rehearing en banc ..... App. 63

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Date Filed	No.	Docket Text
08/30/2005	2	AMENDED COMPLAINT against Tony [sic] Officer Galtelli, John Gardner, Lancè Ellis, Jimmy Evans, Joseph Fortham [sic], Robert Paudert, City of West Memphis, Arkansas, Vance Plumoff [sic], filed by Whitne Rickard.(jml,) (Entered: 09/01/2005)
10/13/2005	9	MOTION to Stay Pending outcome of State of TN v. Vance Plumhoff, John Gardner and Tony [sic] Galtelli by Tony [sic] Officer Galtelli, John Gardner, Lancè Ellis, Jimmy Evans, Joseph Fortham [sic], Robert Paudert, City of West Memphis, Arkansas, Vance Plumoff [sic]. (jae,) (Entered: 10/14/2005)
10/13/2005	10	MEMORANDUM in Support re 9 MOTION to Stay filed by Tony [sic] Officer Galtelli, John Gardner, Lancè Ellis, Jimmy Evans, Joseph Fortham [sic], Robert Paudert, City of West Memphis, Arkansas, Vance Plumoff [sic]. (jae,) (Entered: 10/14/2005)
04/11/2006	19	MOTION for Protective Order ; *Alternative Motion to Quash Depositions* by Tony [sic] Officer Galtelli, John Gardner, Lancè Ellis, Jimmy Evans, Joseph Fortham [sic], Robert

Paudert, City of West Memphis, Arkansas, Vance Plumoff [sic]. (Attachments: # 1 Exhibit Joint Exhibit A# 2 Affidavit Exhibit B – Affidavit of Attorney# 3 Affidavit Exhibit C-Affidavit of Attorney# 4Affidavit Exhibit D-Affidavit of Attorney) (Mosley, Michael) (Entered: 04/11/2006)

4/11/2006 20 MEMORANDUM in Support re 19 MOTION for Protective Order ; *Alternative Motion to Quash Depositions* filed by Tony [sic] Officer Galtelli, John Gardner, Lancè Ellis, Jimmy Evans, Joseph Fortham [sic], Robert Paudert, City of West Memphis, Arkansas, Vance Plumoff [sic]. (Mosley, Michael) (Entered: 04/11/2006)

05/10/2006 29 ORDER STAYING PROCEEDINGS Granting 9 Motion to Stay. Signed by Judge Bernice B. Donald on 5/10/2006. (Donald, Bernice) (Entered: 05/10/2006)

02/10/2009 32 ORDER REOPENING CASE. Signed by Judge Bernice B. Donald on 2/10/09.(Donald, Bernice) (Entered: 02/10/2009)

02/16/2009 34 ANSWER to 2 Amended Complaint by Tony [sic] Officer Galtelli, John Gardner, Lancè Ellis, Jimmy Evans, Joseph Fortham [sic], Robert Paudert, City of West Memphis, Arkansas,

Vance Plumoff [sic].(Mosley, Michael) (Entered: 02/16/2009)

07/29/2009 47 MOTION to Consolidate Cases by all defendants. (Mosley, Michael) (Entered: 07/29/2009)

07/29/2009 48 MEMORANDUM in Support re 47 MOTION to Consolidate Cases filed by all defendants. (Mosley, Michael) (Entered: 07/29/2009)

08/07/2009 50 ORDER granting 47 Motion to Consolidate Cases. Signed by Judge Bernice B. Donald on 8/7/09.(Donald, Bernice) (Entered: 08/07/2009)

11/30/2009 59 MOTION for Summary Judgment by City of West Memphis, Tony [sic] Officer Galtelli, John Bryan Gardner, William H. Johnson, Robert Paudert, Vance Plumoff [sic], City of West Memphis, Arkansas, Lancè Ellis, Jimmy Evans, Joseph Fortham [sic], Tony [sic] Officer Galtelli, John Gardner, Robert Paudert, Vance Plumoff [sic]. (Attachments: # 1 Memorandum Brief in Support, # 2 Statement of Undisputed Material Facts, # 3 Exhibit A – Def Response to PL Discovery, # 4 Exhibit B – Deposition of Joseph Fortham [sic], # 5 Exhibit C – Deposition of Vance Plumhoff, # 6 Exhibit D – Video Deposition of Vance Plumhoff, # 7 Exhibit E – Video Deposition of Joseph Forthman, # 8 Exhibit F – Affidavit of Lance Ellis, # 9 Exhibit

G – Affidavit of Troy Galtelli, # 10 Exhibit H – Affidavit of John Gardner, # 11 Exhibit I – Affidavit of Jimmy Evans)Associated Cases: 2: 05-cv-02489-SHM-dkv, 2:05-cv-02585-SHM-dkv(Mosley, Michael) (Entered: 11/30/2009)

01/25/2010 60 RESPONSE to Motion re (54 in 2:05-cv-02489-SHM-dkv, 59 in 2:05-cv-02585-SHM-dkv) MOTION for Summary Judgment filed by Alexis Lane Allen, Clayton David Allen, Estate of Kelly A. Allen, Maria Nicole Allen, Whitne Rickard. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)Associated Cases: 2:05-cv-02489-SHM-dkv, 2 : 05-cv-02585-SHMdkv(Holloman, Frank) (Entered: 01/25/2010)

01/25/2010 61 RESPONSE in Opposition re 59 MOTION for Summary Judgment filed by Whitne Rickard. (Attachments: # 1 Exhibit Deposition of Joseph Fortham [sic], # 2 Exhibit Deposition of Vance Plumhoff, # 3 Exhibit Police Pursuit Policy, # 4 Exhibit Deadly Force Policy, # 5 Response to Defendants' Statement of Undisputed Material Facts)(Smith, Gary) (Entered: 01/25/2010)

02/08/2010 65 REPLY to Response to Motion re (54 in 2:05-cv-02489-SHM-dkv, 59 in 2:05-cv-02585-SHM-dkv) MOTION for Summary Judgment filed by City

		of West Memphis, City of West Memphis Police Department, Tony [sic] Officer Galtelli, John Bryan Gardner, William H. Johnson, Robert Paudert, Vance Plumoff [sic], City of West Memphis, Arkansas, Lancè Ellis, Jimmy Evans, Joseph Fortham [sic], Tony [sic] Officer Galtelli, John Gardner, Robert Paudert, Vance Plumoff [sic]. Associated Cases: 2:05-cv-02489-SHM-dkv, 2:05-cv-02585-SHMdkv(Mosley, Michael) (Entered: 02/08/2010)
02/04/2011	78	NOTICE OF INTERLOCUTORY APPEAL by Vance Plumoff [sic], Lancè Ellis, Jimmy Evans, Joseph Fortham [sic], Tony [sic] Officer Galtelli, John Gardner. (Mosley, Michael) (Entered: 02/04/2011)
10/09/2012	85	ORDER of USCA as to 78 Notice of Interlocutory Appeal filed by Tony [sic] Officer Galtelli, Joseph Fortham [sic], Lancè Ellis, Vance Plumoff [sic], Jimmy Evans, John Gardner. Affirmed. (jld) (Entered: 10/10/2012)
11/14/2012	86	Appeal Remark re 78 Notice of Interlocutory Appeal :Copy of letter sent to attorney from the COA stating that enclosed is a copy of a corrected page from the decision originally sent on October 9,2012. (jld) (Entered: 11/14/2012)

03/18/2013 88 NOTICE from the Supreme Court of the United States that a petition for a writ of certiorari was filed on March 12,2013 and placed on the docket March 14,2013 as No. 12-1117. (jld) (Entered: 03/18/2013)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Date Filed	Docket Text
03/08/2011	Civil Case Docketed. Notice filed by Appellants Lance Ellis, Jimmy Evans, Joseph Fortham [sic], Tony [sic] Galtelli, John Bryan Gardner and Vance Plumhoff. Transcript needed: y. (DS)
05/16/2011	MOTION filed by Mr. Colin Philip MacKenzie Campbell for Whitne Rickard in 11-5266 to dismiss case for lack of jurisdiction. Certificate of Service: 05/16/2011. [11-5266, 11-5408] (CMC)
05/26/2011	RESPONSE in opposition filed regarding a motion to dismiss – jurisdiction, [4391019-2]; previously filed by Mr. Colin Philip MacKenzie Campbell for Whitne Rickard in 11-5266, 11-5408. Response from Attorney Mr. Michael Allen Mosley for Appellants Vance Plumhoff, John Bryan Gardner, Tony [sic] Galtelli, Lance Ellis, Jimmy Evans and Joseph Fortham [sic] in 11-5266 Certificate of Service:05/26/2011. [11-5266, 11-5408] (MAM)
06/01/2011	REPLY filed by Mr. Colin Philip MacKenzie Campbell for Whitne Rickard regarding *Motion to Dismiss Appeal.* Certificate of Service: 06/01/2011. (CMC)

06/13/2011 ADDITIONAL CITATION filed by Mr. Michael Allen Mosley for Vance Plumhoff, John Bryan Gardner, Tony [sic] Galtelli, Lance Ellis, Jimmy Evans and Joseph Fortham [sic]. Certificate of Service: 06/13/2011. (MAM)

07/05/2011 ORDER filed: The motion to dismiss the officers' appeal, Case No. 11-5266 is GRANTED. The cross-appeal by the Allen Plaintiffs, Case No. 11-5408 is DISMISSED sua sponte for lack of jurisdiction. (No 1292(b) certification by the district court.) Gilbert S. Merritt, Circuit Judge; John M. Rogers, Circuit Judge and Karl S. Forester, U.S. District Judge for the Eastern District of Kentucky.. [11-5266, 11-5408] (DS)

07/14/2011 PETITION for en banc rehearing filed by Mr. Michael Allen Mosley for Vance Plumhoff, John Bryan Gardner, Tony [sic] Galtelli, Lance Ellis, Jimmy Evans and Joseph Fortham [sic] in 11-5266. Certificate of Service: 07/14/2011. [11-5266, 11-5408] (MAM)

09/14/2011 ORDER filed: The petition for panel rehearing is GRANTED. The July 5, 2011 dismissal order in Case No. 11-5266 is VACATED, and the individual defendants' motion to dismiss for lack of jurisdiction is referred to the merits panel. This order does not affect the sua sponte dismissal of Case No. 11-5408. Gilbert S. Merritt, Circuit Judge; John M. Rogers, Circuit Judge and Karl S.

	Forester, U.S. District Judge for the Eastern District of Kentucky. (DS)
11/16/2011	APPELLANT BRIEF filed by Mr. Michael Allen Mosley for Vance Plumhoff, John Bryan Gardner, Tony [sic] Galtelli, Lance Ellis, Jimmy Evans and Joseph Fortham [sic]. Certificate of Service:11/16/2011. Argument Request: requested. (MAM)
12/22/2011	APPELLEE BRIEF filed by Mr. Colin Philip MacKenzie Campbell for Whitne Rickard. Certificate of Service:12/22/2011. Argument Request: requested. (CMC)
01/12/2012	REPLY BRIEF filed by Attorney Mr. Michael Allen Mosley for Appellants Vance Plumhoff, John Bryan Gardner, Tony [sic] Galtelli, Lance Ellis, Jimmy Evans and Joseph Fortham [sic]. Certificate of Service:01/12/2012. (MAM)
10/09/2012	OPINION filed : AFFIRMED, decision not for publication pursuant to local rule 206. Ralph B. Guy, Jr. (Authoring), Eric L. Clay, Circuit Judges and Denise Page Hood, U.S. District Judge for the Eastern District of Michigan, sitting by designation. (LS)
10/22/2012	PETITION for en banc rehearing filed by Mr. Michael Allen Mosley for Vance Plumhoff, John Bryan Gardner, Tony [sic] Galtelli, Lance Ellis, Jimmy Evans and Joseph Fortham [sic]. Certificate of Service: 10/22/2012. (MAM)

11/14/2012	AMENDED OPINION filed (revisions as to pg. 8 and Judge Clay's concurrence as to pg. 12 to the unpublished opinion filed 10/09/12.) – [Edited 11/14/2012 by YH] (LS)
11/15/2012	LETTER SENT to Mr. Michael Allen Mosley for Vance Plumhoff, John Bryan Gardner, Tony [sic] Galtelli, Lance Ellis, Jimmy Evans and Joseph Fortham [sic] and Mr. Gary K. Smith for Whitne Rickard, notifying that the appellants are to advise the court whether petition for rehearing is to be withdrawn in light of the amended opinion. Response due 11/29/2012. If it is not, the appellants will have until that date to file a memorandum of law supplementing their original petition. Should the appellees wish to seek en banc reconsideration of the amended opinion, their petition is due by 11/29/2012. If this office does not hear from either party by 11/29/2012, we will render the petition moot and no further action will be taken. (BLH)
11/15/2012	SUPPLEMENTAL MEMORANDUM OF LAW filed by Mr. Michael Allen Mosley for Vance Plumhoff, John Bryan Gardner, Tony [sic] Galtelli, Lance Ellis, Jimmy Evans and Joseph Fortham [sic]. [4717962-2] Certificate of Service: 11/15/2012. (MAM)
12/13/2012	ORDER filed denying petition for en banc rehearing [4717962-2] filed by Mr. Michael Allen Mosley. Ralph B. Guy, Jr.

and Eric L. Clay, Circuit Judges; and Denise Page Hood, District Judge. (BLH)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Estate of KELLY A. ALLEN, Deceased, CLAYTON DAVID ALLEN, MARIA NICOLE ALLEN, a minor by next friend, Kenneth B. Allen, ALEXIS LANE ALLEN, a minor by next friend, Kenneth B. Allen — **PLAINTIFFS**

v.

CASE NO. 05-2489 DV

CITY OF WEST MEMPHIS, MAYOR WILLIAM H. JOHNSON, CITY OF WEST MEMPHIS POLICE DEPARTMENT, ROBERT PAUDERT, in his personal and official capacity as Chief of the West Memphis Police Department, OFFICER VANCE PLUMHOFF, in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER JOHN BRYAN GARDNER in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER TONY [sic] **GALTELLI in his personal and official capacity as a police officer of the West Memphis Police Department and ANY OTHER UNNAMED**

OFFICERS of the WEST MEMPHIS POLICE DEPARTMENT, in their personal and official Capacities	**DEFENDANTS/ THIRD PARTY PLAINTIFFS**
v.	
ESTATE OF DONALD RICKARD, deceased, through its Administrator, SCOTT PEATROSS	**THIRD PARTY DEFENDANT**
Consolidated with	
WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, By and through her mother SAMANTHA RICKARD As Parent and Next Friend	**PLAINTIFF**
v.	**CASE NO. 05-2585 D V**
CITY OF WEST MEMPHIS, ARKANSAS; OFFICER VANCE PLUMHOFF, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER TONY [sic] **GALTELLI, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JOHN GARDNER, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER**	

LANCE ELLIS, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JIMMY EVANS, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JOSEPH FORTHMAN, individually and in his official capacity as an officer of the West Memphis Police Department; CHIEF ROBERT PAUDERT, individually and in his official capacity as Chief of the West Memphis Police Department **DEFENDANTS**

DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Comes now, Michael Mosley and Robert L. Beard, attorneys for Defendants Vance Plumhoff, Tony [sic] Galtelli, John Gardner, Lance Ellis, Jimmy Evans, Joseph Forthman and Robert Paudert, in their individual and official capacities; and the City of West Memphis, Arkansas, by and through counsel, Mike Mosley and Rob Beard, and for their Statement of Undisputed Material Facts, state:

1. Donald Rickard and Kelly Allen were driver and passenger, respectively, of a white Honda Accord on or about the midnight hour of June 18, 2004, when a West Memphis Police Officer Forthman actuated a traffic stop of the Honda.

2. The stop was initially based on probable cause of a traffic offense, an inoperable headlight. Exhibit A, Defendants' Responses to Interrogatories, No. 7.

3. At various points throughout the pursuit, the following officers joined in the pursuit: Lt. Joseph Forthman, Sgt. Vance Plumhoff, Officer Jimmy Evans, Officer John Gardner, Officer Lance Ellis, and Officer Tony [sic] Galtelli. Exhibit A, Defendants' Responses to Interrogatories, No. 7.

4. Chief Robert Paudert was out of town at the time of the pursuit and thus not involved in the pursuit. Exhibit A, Defendants' Responses to Interrogatories, No. 7.

5. Officer Forthman first saw the vehicle driven by Donald Rickard in the area of Martin Luther King Boulevard and Southland Drive in West Memphis, Arkansas about three or four city blocks from where the Plaintiffs actually were stopped by Officer Forthman. Exhibit B, Forthman Depo. 18:14-24; see also Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No. 7, attached Forthman's Memphis Homicide Witness Statement, Bates No. 001131 (hereinafter Forthman's Memphis Homcide [sic] Witness Statement).

6. Officer Joseph Forthman was driving patrol unit # 279, which had a video camera that recorded the events from when he first turned on his lights to stop the vehicle driven by Donald Rickard through the entire sequence of events. Exhibit A, Defendants'

Responses to Interrogatories, No. 8; Forthman's Memphis Homicide Witness Statement, Bates No. 001130; Exhibit B, Forthman Depo. 19:6-24, 94:18-24.

7. Officer Forthman originally stopped the white Honda because the vehicle only had one operating headlight. Exhibit A, Responses to Interrogatories and Requests for Production of Documents, Forthman Answer to Interrogatory No. 7; Forthman's Memphis Homicide Witness Statement, Bates No. 001130; Exhibit B, Forthman Depo. 19:1-5.

8. At approximately 12:10 a.m., Officer Forthman stopped the white Honda at a Diamond Shamrock, a gas station, in West Memphis, Arkansas. Forthman's Memphis Homicide Statement, Bates No. 001131; Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.8 attached Videotape of Unit #279, at 11:08:12[1] (hereinafter Videotape of Unit #279).

9. The white Honda had a State of Georgia license plate. Exhibit B, Forthman Depo. 95:17-22; Videotape of Unit #279, at 11:08:19.

10. Officer Forthman approached the vehicle on the driver's side. Videotape of Unit #279, at11:08:28; Exhibit B, Forthman Depo. 23:23-24, 24:1.

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[1] It is generally agreed that the time-stamp on Videotape of Unit #279 is approximately one hour behind the actual time that the events occurred. *See* Exhibit B, Forthman Depo., 116:3-10.

11. As Officer Forthman approached the vehicle, Donald Rickard, the driver, turned and stuck his head out of the window. Mr. Rickard yelled to Officer Forthman that he knew that his headlight was out and that he was going to Wal-Mart to fix it. Exhibit B, Forthman Depo. 25:19-24, 98:4-9; Videotape of Unit #279, at 11:08:21.

12. Officer Forthman testified that "[i]t's usually unusual for somebody to already start talking to me before I even get out of my car." Exhibit B, Forthman Depo. 26:4-14.

13. As Officer Forthman approached the vehicle, he asked the driver, Donald Rickard, for his license and registration. Videotape of Unit #279, at 11:08:26.

14. When Officer Forthman walked to the driver-side window, he noticed an indentation, roughly the size of a head or a basketball, in the windshield glass on the driver-side portion of the Honda. Forthman's Memphis Homicide Statement, Bates No. 001131; Exhibit B, Forthman Depo. 27:2-6.

15. Officer Forthman believed the windshield appeared to have been broken in the recent past, because Officer Forthman saw that glass shavings were still on the vehicle's dashboard. Exhibit B, Forthman Depo. 27:6-7.

16. Officer Forthman then asked the driver, Donald Rickard, what was wrong with the windshield.

Videotape of Unit #279, at 11:08:34-11:08:40; Exhibit B, Forthman Depo. 27:8-16.

17. The female passenger, Kelly Allen, answered that they had hit a curb and had broken the windshield. Videotape of Unit #279, at 11:08:34-11:08:40; Exhibit B, Forthman Depo. 27:8-16.

18. Officer Plumhoff testified why the windshield break would lead an officer to be suspicious: "in the case where there is a round break adjacent to one of the side pillars on the vehicle and the sprinkles of glass on the dashboard would tell me that it was a more than likely a recent event, I [Officer Plumhoff] would be suspicious that someone had possibly been struck by that vehicle, like a pedestrian. I've seen that sort of break in cases were [sic] a pedestrian had been struck." Exhibit C, Plumhoff Depo. 35:16-22.

19. Upon seeing beer in the Plaintiffs' vehicle in plain view, Officer Forthman asked: "You haven't had any Keystone tonight have you?" Videotape of Unit #279, at 11:08:58; Exhibit B, Forthman Depo. 28:2-4, 31:15-19.

20. Mr. Rickard responded that he had not. Videotape of Unit #279, at 11:08:58; Exhibit B, Forthman Depo. 28:2-4.

21. Officer Forthman then asked the driver where he was coming from. Forthman's Memphis Homicide Statement, Bates No. 001131; Videotape of Unit #279, at 11:09:03; Exhibit B, Forthman Depo. 27:18-19.

22. Mr. Rickard responded that he was coming from his hotel. Forthman's Memphis Homicide Statement, Bates No. 001131; Videotape of Unit #279, at 11:09:03; Exhibit B, Forthman Depo. 27:18-19.

23. Officer Forthman then inquired as to which hotel the occupants were coming from; however, the driver could not remember the name of the hotel. Forthman's Memphis Homicide Statement, Bates No. 001131; Videotape of Unit #279, at 11:09:07; Exhibit B, Forthman Depo. 27:19-20.

24. At this point, Officer Forthman was still waiting for Donald Rickard to produce his driver's license, which caused Officer Forthman to begin watching Rickard's hands, and Officer Forthman noticed that Rickard kept passing over what appeared to be some form of Tennessee identification in his wallet and that Rickard appeared to be very nervous because Rickard's hands were shaking. Forthman's Memphis Homicide Statement, Bates No. 001131; Exhibit B, Forthman Depo. 27:20-24, 28:1, 4-9.

25. Officers are trained to be vigilant of a person's hands more so than any other part of a person's body while officers are interacting with them "because hands kill you, faces don't." Exhibit B, Forthman Depo. 33:1-17; 34:2-6.

26. Officer Forthman asked Rickard to step out of the vehicle, "[b]ecause he was so nervous and he went over his I.D. card or driver's license several

times without producing it to me." Exhibit B, Forthman Depo., 29:16-20.

27. In addition, Officer Forthman thought it would be best to separate Rickard from Allen because it appeared that Rickard was relying on Allen to respond to the officer, and hopefully Officer Forthman would be able to get identification from Rickard as well as calming him down. Exhibit B, Forthman Depo., 29:23-24, 30:1-4.

28. After being asked twice by Officer Forthman to step out of the vehicle, Donald Rickard, looked at Officer Forthman, then looked at Kelly Allen, and then they sped away from Officer Forthman unlawfully. Forthman's Memphis Homicide Statement, Bates No. 001131; Videotape of Unit # 279, at 11:09:21; see Ark. Code Ann. §5-54-125 (2009).

29. Officer Forthman returned to his vehicle and informed dispatch that he had a "runner," meaning a suspect was fleeing the scene of a traffic stop. Forthman's Memphis Homicide Statement, Bates No. 001131; Videotape of Unit # 279, at 11:09:30.

30. Officer Plumhoff heard over the radio that Officer Forthman had a runner, which Officer Plumhoff interpreted as a pursuit had begun. Exhibit C, Plumhoff Depo. 24:3-5.

31. Officer Vance Plumhoff was driving patrol unit #290, which did not have a video camera. Exhibit A, Defendants' Responses to Interrogatories, No. 8.

32. Officer Plumhoff was on Martin Luther King Drive in West Memphis, Arkansas, which is within close proximity to where Officer Forthman had stopped the Plaintiffs' vehicle, when he became aware of the pursuit. Exhibit C, Plumhoff Depo. 19:7-15.

33. Shortly after learning of the pursuit, Officer Plumhoff became involved in the pursuit and quickly became primary (lead police vehicle in the chase). Exhibit B, Forthman Depo. 46:8-17; Exhibit C, Plumhoff Depo. 19:7-22; Videotape of Unit #279, at 11:09:44.

34. While traveling northbound on Martin Luther King Ave., Officer Jimmy Evans saw a white vehicle being pursued by two other West Memphis Police vehicles turn onto the on-ramp of I-40, at which point he too joined the pursuit. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No. 7 attached Evans' Memphis Homicide Statement, Bates No. 001143 (hereinafter Evans' Memphis Homicide Statement).

35. Officer Jimmy Evans was driving patrol unit #205, which was not equipped with a video camera. Exhibit A, Defendants' Responses to Interrogatories, No. 8; Evans' Memphis Homicide Witness Statement, Bates No. 001142.

36. Officer Lance Ellis was in route to aid Officer Forthman in his stop, when he learned of the pursuit shortly before seeing the Plaintiffs' vehicle being followed by Officer Forthman, Officer Plumhoff, and Officer Evans; Officer Ellis then joined

the pursuit after the pursuit was on I-40. Exhibit F, Affidavit of Lance Ellis ¶¶ 9-11.

37. Officer Lance Ellis was driving patrol unit #284, which was equipped with a video camera that was able to record some of the events at issue in this case. Exhibit A, Defendants' Responses to Interrogatories, No. 8.

38. When Officer Galtelli heard Officer Forthman state over the radio that he had a runner, Officer Galtelli was working a traffic stop with Officer Gardner, who instructed him to assist in the pursuit. Exhibit G, Affidavit of Troy Galtelli ¶¶ 6-11.

39. Officer Troy Galtelli was driving patrol unit #286, which was equipped with a video camera that was able to record the events at issue in this case. Exhibit A, Defendants' Responses to Interrogatories, No. 8.

40. After finishing the traffic stop, Officer Gardner was the last police officer to join the pursuit. Exhibit H, Affidavit of John Gardner ¶¶ 9-13.

41. Officer John Gardner was driving patrol unit #287, which was equipped with a video camera that was not operational. Exhibit A, Defendants' Responses to Interrogatories, No. 8.

42. While on the I-40 on-ramp, Officer Forthman stated over the radio "we got enough [meaning police vehicles to perform a rolling roadblock] lets shut him down before he gets to Memphis." Videotape of Unit #279, at 11:09:57.

43. Once on I-40, Officer Forthman stated "I gonna get in front of him . . . whoever to uh . . . I am going to get in front of him here" as he maneuvered his police car to the left lane in an attempt to get around Plaintiffs vehicle. Videotape of Unit #279, at 11:10:16.

44. In his deposition, Officer Forthman explains the purpose of a rolling roadblock and how it is typically executed:

> It's where we utilize three to four cars depending on where you're at, normally it's four cars, and the purpose behind the rolling roadblock is to slow down the fleeing vehicle where we can bring it to a stop by the use of blocking him in with our vehicles. Basically what would happen, . . . , you first need somebody in front of them to slow them down; and then you need somebody to the left and right so he'd have a hard time maneuvering around the car in front. The one in back would keep him from coming to a dead stop and maneuvering around the cars. So basically it's there to stop a pursuit at a safe means so we can bring it to an end.

Exhibit B, Forthman Depo. 174:10-24

45. The video from Officer Forthman's vehicle shows Officer Jimmy Evans going around Officer Forthman's vehicle. Videotape of Unit #279, at 11:11:14.

46. Then Officer Forthman tells Officer Evans that if he can get in front of the White Honda then do so. Videotape of Unit #279, at 11:11:32.

47. Before Officer Evans had a chance to get in front of the Plaintiffs, Officer Plumhoff is heard over the radio saying, "he [driver of the fleeing vehicle] just tried to ram me." Videotape of Unit #279, at 11:11:36.

48. Officer Plumhoff testified that this was the first encounter he had with the white Honda. Exhibit D, Video of Plumhoff Deposition, DVD #2, 12:29:18-12:30:19[2]; Exhibit C, Officer Plumhoff Depo., 111:13-24.

49. Because the flashing lights in the dashboard video somewhat washout the aggravated assault committed by the driver against Officer Plumhoff, he, Officer Plumhoff, in his deposition, while pointing to the Videotape of Unit #279 (stopped at 11:11:34), explains "Right there you can see him move from left to right, and I'm over the fog line into . . . " Exhibit D, Plumhoff Deposition, DVD #2 at 12:30:4; Exhibit C, Plumhoff Depo. 112:7-9, 113:11-20; Videotape of Unit #279, at 11:11:34.

50. Officer Plumhoff testified that his vehicle was going at least seventy miles per hour, when Mr.

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[2] In order to be consistent, all, specific references to videos will be based on the timestamp on the video screen.

Rickard's vehicle attempted to ram his. Exhibit C, Plumhoff Depo. 149:14-23.

51. To avoid having a collision with the Plaintiffs' vehicle, Officer Plumhoff took his foot off the accelerator and tapped his breaks. Exhibit C, Plumhoff Depo. 150:5-17.

52. Because of the rate of speed, once Officer Plumhoff took his foot off the accelerator his vehicle began to slow down. Exhibit C, Plumhoff Depo. 150:1-4.

53. After Officer Plumhoff avoided being hit by the white Honda on the right shoulder of I-40, the Honda then quickly crossed over a couple lanes to the left lane and attempted to ram Officer Evans' vehicle as Officer Evans attempted to pass the Plaintiffs in order to perform the road block. Videotape of Unit #279, at 11:11:42.

54. Officer Forthman can be heard on the radio saying "he is trying to ram another car." Videotape of Unit #279, at 11:11:42.

55. Officer Evans perceived this as an attempt to ram his car as an attempt by Mr. Rickard to continue his flight. Exhibit I, Affidavit of Jimmy Evans ¶ 11.

56. James Pearce, a civilian ride-along with Officer Plumhoff during the events, told Memphis Police Department shortly following the events that the Honda had intentionally tried to ram Officer Plumhoff's and then tried to ram Officer Evans'

vehicle. Exhibit A, Defendants' Responses to Plaintiffs' Request for Production No. 7 Pearce's Memphis Homicide Witness Statement, Bates No. 001140.

57. Using the Videotape of Unit #279, Officer Forthman showed during his deposition exactly where on the video Mr. Rickard can be seen committing the aggravated assault against Officer Evans. Exhibit E, Video of Forthman Deposition, DVD #1 at 11:56:40-11:57:00 and 11:57:52-11:58:18.

58. Officer Evans almost lost control of his vehicle as he attempted to avoid the Plaintiffs vehicle from striking his car. Evans's Memphis Homicide Witness Statement, Bates No. 001143.

59. Officer Forthman saw the vehicle attempt to hit Officer Evans' vehicle and Officer Forthman was the one who stated on the radio that the Honda tried to ram another police car and that there were aggravated assault charges against the occupants. Exhibit B, Forthman Depo., 99:13-22, 100:10-19.

60. Officer Plumhoff perceived the actions by Mr. Rickard as an attempt to ram his patrol car as a means to continue his unlawful flight. Exhibit C, Plumhoff Depo., 114:18-115:6; Exhibit D, Video of Plumhoff Deposition, DVD #2, 12:32:50-12:33:16.

61. Officer Forthman described what he saw and why he deemed the action as being aggravated assault: "He [Mr. Rickard] just happened to be going from one lane to another when he [Mr. Rickard] used his vehicle intentionally to keep or, to even run

Officer Evans off the road to keep him [Officer Evans] from going past him [Mr. Rickard]." Exhibit B, Forthman Depo., 102:1-5.

62. Officer Forthman told West Memphis dispatch "We do have aggravated assault charges on him West Memphis advise Memphis that we do have felony charges." Videotape of Unit #279, at 11:11:51.

63. Because of the speed and maneuvers made by the Honda, a reasonable officer could conclude this act of fleeing itself was felonious[3].

64. As Officer Forthman went under the trellis of the I-40 bridge spanning the Mississippi River, Officer Plumhoff can be heard on the radio stating that the Plaintiffs have one more count of aggravated assault. Videotape of Unit #279, at 11:12:34.

65. Officer Plumhoff testified as to his reason for making this radio broadcast, "on the bridge I tried to get him – get around him again, and he moved over towards me again to the left that time. I believe at that moment I was in the inside lane and he was in the center lane when he – at that time I hadn't gotten as far up next to him. It was probably – my front wheel would have been about even with his back wheel; and he came over to the left, and I had to drop

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[3] Ark. Code Ann. §5-54-125 (2004) states that fleeing in a vehicle is a Class A misdemeanor but fleeing can be a Class D felony if the person creates a risk of "substantial danger of death or serious physical injury to another person."

back again." Exhibit C, Plumhoff Depo., 56:22-24, 57:1-6.

66. These aggravated assault[4] and felony fleeing[5] acts on I-40 occurred in the State of Arkansas. See Exhibit B, Forthman Depo., 65:18-23.

67. After crossing over into Tennessee, Officer Forthman asked West Memphis dispatch if they had received any response from Memphis Police Department or Shelby County Sheriffs Department. Videotape of Unit #279, at 11:13:14.

68. The officers proceeded into Tennessee because Arkansas adopted the "Uniform Act on Interstate Fresh Pursuit," with a stated purpose as "[t]he purpose of this subchapter is to prevent criminals from utilizing state lines to handicap our police in their apprehension." Ark. Code Ann. §16-81-402.

69. A few seconds later, the white Honda made a quick and dangerous exit off of I-40 onto Danny Thomas Blvd., Memphis, TN. Videotape of Unit #279, at 11:13:20.

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[4] Ark. Code Ann. § 5-13-204 defines aggravated assault as when, "(a) A person commits aggravated assault if under the circumstances manifesting extreme indifference to the value of human life, he or she purposely: (1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person . . . (b) Aggravated assault is a Class D felony."

[5] See Ark. Code Ann. § 5-5-54-125.

70. In order to exit at Danny Thomas Blvd., Mr. Rickard cut to the right crossing about two lanes of traffic, almost colliding with a civilian vehicle pulling a boat. Videotape of Unit #279, at 11:13:20-23.

71. The pursuit was only momentarily on Alabama Ave. before the Honda turned right onto Danny Thomas Blvd[6]. Exhibit C, Plumhoff Depo., 60:2-4; Videotape of Unit #279, at 11:13:36-43.

72. A misconception has developed in the media about the radio traffic that occurred about at this stage of the pursuit. (Officer Plumhoff comments on the radio that the officers needed to end the pursuit, to which Officer Evans responds with a question about terminating the pursuit.) Officer Plumhoff clarifies by instructing Officer Evans to get in front of the white Honda. Officer Plumhoff was instructing Officer Evans to physically put an end to the pursuit by stopping the white Honda, as opposed to calling off the pursuit. Videotape of Unit #279, at 11:13:35-11:13:56

73. One of the Officers, tells Officer Evans to "see if you can get in front of him" in order to box the Plaintiffs in and as peacefully as possible terminate

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[6] The eastbound I-40 exit at Danny Thomas Blvd. is a partial cloverleaf, which allows access to either Alabama Ave., through a tangent, or to Danny Thomas Blvd. by continuing on the circumference of the partial cloverleaf. Exhibit C, Plumhoff Depo. 59:16-24, 60:1-2; *see also,* Videotape of Unit #279, at 11:13:24.

the pursuit. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.8 attached Videotape of Unit #284, 12:16:37[7] (hereinafter Videotape of Unit #284).

74. While the pursuit was on Danny Thomas Blvd., Officer Galtelli was one of the last, if not the last, officer in the pursuit; therefore, the dashboard video from his vehicle provides a view of most, if not all, the police cars and the Plaintiffs' car in the pursuit. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.8 attached Videotape of Unit #286, at 12:17:22-33[8] (hereinafter Videotape of Unit #286).

75. As the white Honda approached Jackson Ave., the vehicle was in the middle lane. Videotape of Unit #286, at 12:17:30; Videotape of Unit #279, at 11:14:08; Evans's Memphis Homicide Witness Statement, Bates No. 001143.

76. From this center-lane position, the Honda made a quick right turn onto Jackson Ave., whereby contact occurred between Officer Evans's vehicle and the Plaintiffs' vehicle. Videotape of Unit #286, at 12:17:34; Evans's Memphis Homicide Witness Statement, Bates No. 001143.

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[7] The footage of Videotape of Unit #284 was captured in black and white.

[8] The Videotape of Unit #286 has no audio, which has been recognized by both parties. *See* Exhibit C, Plumhoff Depo.,136:1-5.

77. The contact caused the Plaintiffs' vehicle to spin around into a parking lot at the intersection of Danny Thomas Blvd. and Jackson Ave. Videotape of Unit #286, at 12:17:35; Evans's Memphis Homicide Witness Statement, Bates No. 001143.

78. Officer Jimmy Evans explained, "[a]s we were coming up on Jackson the suspect he went wide like he was going to get in the center lane then he made a right hand turn. I tried to cut to the inside of the turn in another attempt to get in front of him. At that time he locked the car up, and I applied my brakes, and started skidding, the left front of my vehicle skidded into the right rear of the suspect's vehicle. He spun out into the parking lot at the corner of Jackson and Danny Thomas." Evans's Memphis Homicide Witness Statement, Bates No. 001143; Exhibit I, Affidavit of Jimmy Evans ¶¶ 14-15.

79. As a result of the impact, Officer Evan's vehicle, Unit # 205, totally lost its front driver-side headlight, sustained a severe indentation of the front driver-side quarter panel, and a noticeable crumpling of the patrol car's hood. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.8 attached Pictures of Unit #205, Bates Nos. 002009-002016.

80. When Officer Plumhoff saw the Honda spinout, he turned right into the parking lot in order to get in front of suspects' vehicle. Exhibit C, Plumhoff Depo., 65:9-12; Videotape of Unit #286, at 12:17:36.

81. Officer Plumhoff testified that when he first entered the parking lot the Honda was a little offset in front of Officer Plumhoff's vehicle with the Plaintiffs' right front fender pointing towards Officer Plumhoff. Exhibit C, Plumhoff Depo., 65:13-14, 16-18.

82. After the Honda spunout, the Honda then accelerated forwards and rammed into Officer Plumhoff's vehicle. Videotape of Unit #286, at 12:17:37; Exhibit C, Plumhoff Depo., 140:12-15; Exhibit B, Forthman Depo., 134:10-19.

83. As the Plaintiffs started to accelerate towards Officer Plumhoff, Mr. Rickard turned the vehicle more towards Officer Plumhoff's vehicle and Officer Plumhoff perceived this as Rickard's attempt to cause a greater impact with Officer Plumhoff. Exhibit C, Plumhoff Depo., 65:18-20.

84. Officer Plumhoff testified that he applied his brakes and warned his civilian ride-along, James Pearce, that they were about to have a collision. Exhibit C, Plumhoff Depo., 65:24-66:1, 74:15-21.

85. The collision between Officer Plumhoff and the Honda was a straight head-on collision with the impact being flush across the front of Officer Plumhoff's vehicle. Exhibit C, Plumhoff Depo., 65:9-12.

86. The collision is captured on the Videotape of Unit #286. 12:17:37.

87. The impact was so severe that Officer Plumhoff thought his vehicle was disabled. Officer

Plumhoff believed his car was disabled based on the sharp impact of the collision, and the force of the collision. Exhibit C, Plumhoff Depo., 66:7-9; 76:16-23.

88. Officer Plumhoff's vehicle, Unit #290, suffered a collapsed grill guard, moderate damage to the front driver-side headlight, and moderate displacement of the vehicle's hood. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.8 attached Pictures of Unit #290, Bates Nos. 002017-002027.

89. The impact was so severe that Officer Plumhoff sought medical attention for injuries to his neck as a result of the impact. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.5 Plumhoff Medical Records Bates Nos. 000714-000722.

90. At or near this stage of events, the other police officers formed a semicircle around the Rickard vehicle in an attempt to use the building in the lot to prevent the Honda from continuing to flee and continuing to endanger others; (starting from the left when facing the Plaintiffs), Officer Evans was directly on Plaintiffs' front passenger corner, Officer Forthman was at the back passenger-side of Officer Evans's vehicle, then Officer Plumhoff was next to the right, and Officer Gardner was nose to nose with the Plaintiffs' vehicles [sic]. Videotape of Unit #279, 11:14:21; Exhibit B, Forthman Depo., 117:11-21, 119:16-21; Exhibit C, Plumhoff Depo., 119:19-23.

91. Officer Galtelli pulled between Officer Gardner and the building. Videotape of Unit #286, 12:17:43.

92. Officer Ellis pulled his vehicle behind Officer Plumhoff and to the right-rear of Officer Forthman's vehicle after the suspects' vehicle rammed Officer Plumhoff. Videotape of Unit #284, 12:17:00.

93. Because of the building and the location of the police cars, the only unobstructed means for the Plaintiffs to escape was to backup. Exhibit C, Plumhoff Depo., 63:16-23, 64:5-7; Videotape of Unit #279, at 11:14:17; Exhibit B, Forthman Depo., 118:5-10.

94. In an attempt to escape, Mr. Rickard reversed his vehicle away from Officer Plumhoff's vehicle. Videotape of Unit #279, at 11:14:18; Videotape of Unit #286, at 12:17:41.

95. As the Honda was reversing, Officer Evans and Officer Plumhoff exited their vehicles and approached the Plaintiffs' vehicle. Videotape of Unit #279, at 11:14:20; Videotape of Unit #286, at 12:17:42; Videotape of Unit #284, at 12:11:01.

96. Officer Evans arrived at the Plaintiffs' vehicle before the other officers. Exhibit C, Plumhoff Depo., 82:15-20.

97. Officer Evans tried to gain entrance into the vehicle by pounding on the passenger-side window and windshield with his gun in hand. Videotape of

Unit #279, at 11:14:21; Videotape of Unit # 286, at 12:17:42; Videotape of Unit #284, at 12:17:01; Evans's Memphis Homicide Witness Statement, Bates No. 001143; Exhibit B, Forthman Depo., 119:22-24, 120:11-19, 154:8-15; Affidavit of Jimmy Evans ¶16.

98. Simultaneously, Officer Plumhoff and Officer Gardner[9] exited their respective vehicles and headed towards the white Honda. Videotape of Unit #279, at 11:14:21; Exhibit B, Forthman Depo., 121:8-20; Exhibit C, Plumhoff Depo., 120:19-21.

99. Officer Plumhoff approached with his firearm in his hands. Videotape of Unit #279, at 11:14:22; Exhibit C, Plumhoff Depo., 120:3-14; Exhibit B, Forthman Depo., 120:20-24, 121:1-5.

100. As other officers approached, the Plaintiffs' vehicle stopped reversing and drove forward striking Officer Gardner's vehicle. Videotape of Unit #279, at 11:14:22-24; Videotape of Unit #286, at 12:17:43-46; Exhibit C, Plumhoff Depo., 125:9-12, 127:21-128:1; Exhibit H, Affidavit of John Gardner ¶ 18.

101. On Unit Video #286, the suspects' car can be seen spinning its front wheels and repeatedly ramming Officer Gardner's patrol car. 12:17:43-12:17:46.

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[9] Officer Gardner is the only West Memphis Police Officer who was wearing a baseball-style cap in the videos.

102. In fact on Videotape of Unit #279, the Plaintiffs' engine can be heard revving. Videotape of Unit #279, at 11:14:23; Exhibit H, Affidavit of John Gardner ¶ 20.

103. Almost simultaneously, Officer Plumhoff fired three shots into the vehicle towards Mr. Rickard. Videotape of Unit #279, at 11:14:24; Videotape of Unit #286, at 12:17:46.

104. In an emotional remembrance, Officer Plumhoff testified as to why he fired his weapon:

> I heard the engine start to race and tires barking, squealing, . . . , and it just kind of hit me all at once. It was like – like, oh, God; but I had my front sights pretty much lined up on his [Mr. Rickard's] chest. I remember that part just as clear as a bell, and I just – it was like, oh, God, I'm about to get killed; and I squeezed. I remember firing three rounds . . . I had no doubt as to how many rounds I had fired; and I knew he was hit, because he snapped over to the left and then immediately just sat right back up and looked, looked forward.

Exhibit D, Video of Plumhoff Deposition, DVD #2, at 11:18:32-11:20:02; Exhibit C, Plumhoff Depo., 67:6-19.

105. Upon hearing the gunfire, Officer Galtelli believed that the shots had been fired from inside the white Honda towards one of his fellow officers. Exhibit G, Affidavit of Troy Galtelli ¶17.

106. Officer Ellis, upon hearing the shots, did not know whether an officer or the suspects fired the shots. Exhibit F, Affidavit of Lance Ellis ¶14.

107. Realizing that the Honda's driver was going to try to escape through the rear opening, Officer Forthman reversed his vehicle in an attempt to block the escape. Videotape of Unit #279, at 11:14:24; Videotape of Unit #284, at 12:17:05; Exhibit B, Forthman Depo., 126:23-24, 127:21-24; Exhibit E, Video of Forthman Deposition, DVD #2 at 12:29:34-36[10]; Forthman's Memphis Homicide Witness Statement, Bates No. 001132.

108. The Honda then reversed in a 180 degree arc onto Jackson Ave. heading east. Videotape of Unit #279, at 11:14:25-29; Videotape of Unit #286, at 12:17:47-51; Videotape of Unit #284, at 12:17:08-10; Forthman's Memphis Homicide Witness Statement, Bates No. 001132.

109. During these events, the Honda struck Officer Evans' right hand. Exhibit I, Affidavit of Jimmy Evans ¶ 16.

110. As the Honda was reversing, Officer Galtelli exited his vehicle and ran to join the other officers, who were chasing the vehicle as it maneuvered on

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[10] Officer Forthman was asked to show on Videotape of Unit #279 when he made the decision to block the egress route; however, the [sic] no record was made of the timestamp on dashboard video beyond what is visible on video of Forthman's deposition.

Jackson Ave. Videotape of Unit #286, at 12:17:49; Videotape of Unit #279, at 11:14:27.

111. As the Honda reversed onto Jackson Ave., Officer Ellis was standing to the rear passenger-side of the Plaintiffs vehicle and had to quickly move to avoid being hit by the Honda. Videotape of Unit #279, at 11:14:28; Exhibit F, Affidavit of Lance Ellis ¶15; Exhibit E, Video of Forthman Deposition, DVD #2 at 1:03:48-1:04:10; Exhibit B, Forthman Depo., 152:5-20.

112. Officer Gardner had his gun out as he and other officers fanned out to attempt to end the pursuit on Jackson Ave. Videotape of Unit #279, at 11:14:30; Exhibit H, Affidavit of John Gardner ¶23.

113. Officer Gardner observed Mr. Rickard look down the road and then put the vehicle in drive, which caused Officer Gardner to believe that the officer to his right was in imminent danger because that officer was in the direct path that the Honda was about to take. Exhibit H, Affidavit of John Gardner ¶¶ 24-26; Videotape of Unit #279, at 11:14:30.

114. In order to protect his fellow officers and stop the driver from harming others, Officer Gardner fired ten shots towards the driver. Videotape of Unit #279, at 11:14:31-32; Videotape of Unit #284, at 12:17:11; Videotape of Unit #286, at 12:17:53; Exhibit E, Video of Forthman Deposition, DVD #2 at 12:40:28-59, 1:04:51-1:04:57; Exhibit B, Forthman Depo, 131:11-24, 153:17-24, 154:1-5; Exhibit C, Plumhoff Depo., 132: 19-24, 133:5-19, 134:2-4; Exhibit A, Defendants' Responses to Interrogatories, No. 7.

115. Officer Gardner's department-issued weapon had fifteen rounds in the magazine plus one round in the chamber for a total of sixteen rounds. Exhibit H, Affidavit of John Gardner ¶ 29.

116. In addition to Officer Plumhoff and Officer Gardner, Officer Galtelli also fires two shots towards the driver in an attempt to stop the threat of serious bodily injury or death posed by the Plaintiffs to himself, fellow officers, and the public. Exhibit A, Defendants' Responses to Interrogatories, No. 7; Exhibit G, Affidavit of Troy Galtelli ¶ 18.

117. Officer Forthman testified "we [the West Memphis Police Officers] don't shoot to kill. We shoot to stop a threat." Exhibit B, Forthman Depo, 159: 11-13.

118. Even as the Officers were shooting, Mr. Rickard continued to flee down Jackson Ave. Videotape of Unit #279, at 11:14:31; Videotape of Unit #284, at 12:17:11; Videotape of Unit #286, at 12:17:53.

119. Officer Plumhoff, Officer Gardner, and Officer Galtelli, each did not intend to shoot the passenger, Kelly Allen. *SUMF* ¶ 111 (specifically citing Exhibit C, Plumhoff Depo., 67:9-10); Exhibit H, Affidavit of John Gardner ¶ 27; Exhibit G, Affidavit of Troy Galtelli ¶ 22.

120. Based on the video timestamps from Videotape of Unit #279, all these events described in paragraphs 100 to 118 occurred within a matter of seconds. 11:14:20-11:14:34.

121. Officer Forthman pursued the Plaintiffs as they fled down Jackson Ave. for several blocks until the Plaintiffs' vehicle crashed into a building at the corner of Jackson Ave. and Manassas St. Videotape of Unit #279, at 11:14:33-11:14:51.

122. When Inspector Eddy West[11] arrived on the scene, Officer Forthman informed him as to the events, "[w]recked out that was their car, wrecked-out down here, no he wrecked out. They tried to position their car to keep him from running, he rammed the car. Think guys came around and he backed up on the guys going around, and I remember seeing Gardner, he starts shooting, Gardner shot because he's protecting I guess the guys behind and Vance also shot his weapon." Videotape of Unit #279, at 11:16:43-57, 11:19:51-11:20:26; Exhibit B, Forthman Depo., 141:4-8, 148:17-24, 149:1-16.

Respectfully submitted,

Vance Plumhoff, Tony [sic] Galtelli, John Gardner, Lance Ellis, Jimmy Evans, Joseph Forthman and Robert Paudert, in their individual and official capacities; and William Johnson in his official capacity only
Memphis, Arkansas

SEPARATE DEFENDANTS

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[11] Because Chief Paudert was out-of-town, Inspector Eddy West was the highest ranking West Memphis Police Officer available. *See* Exhibit B, Forthman Depo., 62:15-21.

By: /s/ Michael Mosley

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[Certificate Of Service Omitted In Printing]

EXHIBIT A

IN THE UNITED STATES DISTRICT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, by and through her mother SAMANTHA RICKARD As Parent and Next Friend, Plaintiff

vs. No. 05-2585

CITY OF WEST MEMPHIS, ARKANSAS, OFFICER VANCE PLUMOFF [sic], Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER TONY [sic] GALTELLI, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JOHN GARDNER, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER LANCE ELLIS, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JIMMY EVANS, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JOSEPH FORTHAM [sic], Individually and in his official capacity as an officer of the West Memphis Police Department, and CHIEF ROBERT PAUDERT, Individually and in his official capacity as Chief of the West Memphis Police Department, Defendants

DEFENDANTS' RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS PROPOUNDED TO VANCE PLUMOFF [sic], TONY [sic] GALTELLI, JOHN GARDNER, LANCE ELLIS, JIMMY EVANS, .JOSEPH FORTHMAN, AND ROBERT PAUDERT

COME NOW DEFENDANTS[1], Vance Plumhoff, Jimmy Evans, Joseph Forthman, Troy Galtelli, John Gardner, Lance Ellis, and Robert Paudert and for their Responses to Plaintiff s First Set of Interrogatories and Requests for Production of Documents herein state;

INTERROGATORY NO. 1: Please state your full name, address, telephone number, date of birth, and social security number.

ANSWER:

Vance Leland Plumhoff: 626 E. Broadway, West Memphis, AR 72303 (police department; additionally, Defendants may be contacted through undersigned counsel); DOB [redacted]. Telephone: Defendants may be contacted through undersigned counsel; Defendant objects for privacy reasons to giving his social

[1] Separate Defendants' verify their responses only to the extent that they have given individual responses; they do not verify their fellow Defendants' responses, except where it is noted that All Defendants have responded to an Interrogatory or Request for Production of Document.

security number. Further, this information is not reasonably calculated to lead to the discovery of admissible evidence.

Jimmy McDermott Evans: 626 E. Broadway, West Memphis, AR 72303 (police department; additionally, Defendants may be contacted through undersigned counsel); DOB: [redacted]; Telephone: Defendants may be contacted through undersigned counsel; Defendant objects for privacy reasons to giving his social security number. Further, this information is not reasonably calculated to lead to the discovery of admissible evidence.

Joseph Michael Forthman: Dickinson, TX 77539; DOB [redacted], Defendant may be contacted through undersigned counsel; Defendant objects for privacy reasons to giving his social security number. Further, this information is not reasonably calculated to lead to the discovery of admissible evidence.

* * *

ANSWER: *See Response to Interrogatory No. 6.*

INTERROGATORY NO. 7: Please state with specificity the exact sequence of events from the time that you learned of or participated in any pursuit until the time that the pursuit was ended in the City of Memphis, Tennessee when the vehicle Donald Rickard was traveling in crashed. This includes, but is not limited to, all charges known by you prior to the instigation of the pursuit, whether you knew the identity and address of the driver of the vehicle being

pursued, the specific reason for the pursuit, the pursuit route, the speeds of the pursuit, identity of other officers or agencies involved in the pursuit or in the pursuit area, whether lights and sirens were utilized, the places where lights and sirens were turned on or turned off, the identity and location of other officers and vehicles during the pursuit, the location of your vehicle if you participated in the pursuit, whether your vehicle came in contact with the Rickard vehicle, the location where such contact occurred, the reason for the contact, the speeds that both your vehicles and the Rickard vehicle were traveling at the time of the contact, the reason for the contact, your intention in making contact with the Rickard vehicle and, if you fired any gunshots, your intention in firing such shots, and any other fact which occurred from the time you learned of or participated in the pursuit until its conclusion.

ANSWER: *See attached* Statements to Memphis Police Department; *See also* Initial Disclosures including videotapes from three police units and said statements. In addition, the Separate Defendants state as follows:

Robert Paudert: I was out of town and was not involved in the pursuit.

Jimmy Evans: *See interview with Memphis P.D.*; I learned that the vehicle in question was unlawfully fleeing from another officer. I did not otherwise know the exact nature of the charges against the driver at that time. The driver committed a count of

aggravated assault in my presence when he attempted to hit the patrol unit driven by Vance Plumhoff the bridge between Arkansas and Tennessee. Also, during the pursuit the White Honda committed aggravated assault against me personally as the driver swerved in an attempt to hit my patrol unit. The driver and car presented a danger of serious physical injury or death to myself, Officer Plumhoff, and the public in general at the time he committed the counts of aggravated assault. I am unaware of the exact speeds of the pursuit. The route of the pursuit that I was involved in was: Interstate 40 from Arkansas into Tennessee, to Danny Thomas Blvd. to Jackson St. I had my lights and sirens on during the pursuit. Upon information and belief I turned my siren off at Jackson and Manassas streets. I knew during and/or after the pursuit that Officers Forthman, Gardner, and Plumhoff were also involved in the pursuit. I fired no gun shots. My hand was hit by the mirror of the White Honda. For further information, see my statement to Memphis P.D. provided in Initial Disclosures.

Lance Ellis: *see interview with Memphis P.D* which to the best of my knowledge was accurate when given; however, reviewing the tapes has indicated that the sequence of certain events may have occurred differently than I recalled, although not substantially so. I learned that the vehicle in question was unlawfully fleeing on my way to the pursuit. I did not know the driver's identity or address. I learned during the pursuit that the driver committed

aggravated assault with his vehicle and, thus, threatened death or serious physical injury to other officers and members of the public. The pursuit route was Interstate 40 into Tennessee from Arkansas, to Danny Thomas Blvd., to Jackson St. I do not recall exact speeds of the pursuit. I became aware during and after the pursuit that Officers Forthman, Gardner, Galtelli, Plumhoff, and Evans were also involved in the pursuit. I recall turning my lights and sirens on at Martin Luther King, Jr. Drive in West Memphis, AR. I recall seeing that Officer Forthman had his lights on. I turned off my siren at the end of the pursuit at Jackson where the White Honda wrecked. I do not recall when I turned my lights off. I turned my siren on again when the White Honda fled again. I did not come into contact with the White Honda. I fired no gun shots.

Joe Forthman: *see interview given to Memphis P.D.* I initiated my lights when I originally attempted to stop the White Honda driven by Donald Rickard for having only one headlight operating. I turned my siren on after the individuals in the White Honda fled the scene of the lawful traffic stop. I left my lights and sirens on until the White Honda crashed at Jackson and Mannassas Streets in Memphis; at that time I left my lights on, but turned my siren off. I then went back to Jackson St. where the car originally spun out, to secure that scene. My lights were turned off when I went to 201 Poplar in Memphis, TN later. In addition, my car never came into contact with the White Honda.

Vance Plumhoff: *see statement given to Charles McDougal* provided with Defendants' Initial Disclosures. Pursuit Route: MLK, Jr. Drive in West Memphis, AR, to Interstate 40, to Danny Thomas Blvd. in Memphis, TN, to Jackson St. In addition, I first heard Joe Forthman indicate on the radio that he had a suspect fleeing. At that time, I understood the driver was fleeing a lawful traffic stop; thereafter, charges of aggravated assault occurred when the driver of the White Honda attempted to ram my car on the bridge between Arkansas and Tennessee and attempted to ram the patrol unit driven by Jimmy Evans. Further, the driver rammed my patrol unit, causing significant damage and threatening deadly force against me and my civilian ride along, on Jackson St. in Memphis. I used my lights and sirens during the pursuit. I am not certain the exact time they were turned off, except it occurred after the White Honda crashed. Sometime during the pursuit I took the lead until Jimmy Evans got in front of me on the bridge. As stated, the car driven by Mr. Rickard rammed my car in an attempt to cause serious physical injury to myself or death, and his actions constituted the use of deadly physical force against me and my civilian ride along, Andy Pearce. This occurred on Jackson St. after the White Honda spun out into a parking lot. When the car hit me, I was traveling at most 10 mph, but it is possible it was less. The White Honda was driving, upon information and belief, between 10 and 20 mph at the time the driver rammed my car head on. I fired upon information and belief three shots to end the use of deadly force and the

threat of serious physical injury or death to me, my ride along, other officers, and the public in general caused by the White Honda and its driver.

Troy Galtelli: *See statement given to Tennessee Prosecuting Attorney in application for pretrial diversion.* In addition, I first heard that a traffic stop led to a fleeing suspect. I did not know the identity of the driver until approximately the following day. The reason for the pursuit initially was a fleeing suspect from a lawful traffic stop and later included charges of aggravated assault. The pursuit route: Interstate 40, to Danny Thomas Blvd., to Jackson St. Upon information and belief, my speed during parts of the pursuit approximated 100-110 mph. During the pursuit, I was aware that Officers Plumhoff, Forthman, and Gardner were also involved in the pursuit. My lights and sirens were utilized during the pursuit. My lights were on but as I entered I-40, my clipboard fell and knocked my light switch to the off position. Thereafter, I was notified by another officer to turn my lights back on and I did so when I reached approximately the bridge going from Arkansas to Tennessee. Upon information and belief, my siren was operating throughout the duration of the pursuit. My car did not come into contact with the White Honda. I fired my weapon, upon information and belief, twice to stop the threat of serious physical injury or death and the acts of deadly physical force posed by the White Honda.

John Gardner: *See Defendants' Initial Disclosures.* The pursuit route: On-ramp to Interstate 40,

on Interstate 40, to Danny Thomas Blvd. in TN, to Jackson St. I knew at the time I became involved in the pursuit that Forthman had a suspect fleeing a lawful traffic stop. Through the course of the pursuit, I learned that the driver of the White Honda committed aggravated assault. I did not know the subject's identity during the pursuit. During the pursuit, I heard over the radio that the White Honda's driver committed acts of aggravated assault. Upon information and belief, I ran lights and sirens during most if not all of my involvement in the pursuit. The suspect's car rammed my car and continued to accelerate in a parking lot on Jackson St. in Memphis after the car spun out. Upon information and belief I was in Unit 287. During the pursuit, I believe I was aware that Officers Forthman, Plumhoff, Galtelli, Evans were also participating in the pursuit. During the pursuit, I was behind those officers coming over the bridge from AR to TN. After crossing the bridge I eventually passed who I believed to be Galtelli and at Danny Thomas I passed who I believed to be Ellis. I discharged my weapon, upon information and belief, ten times in order to stop the threat of serious physical injury or death that was caused by the driver of the White Honda and to protect my fellow officers from said threat.

INTERROGATORY NO. 8: If you did not include this in your Answer to the preceding Interrogatory, please identify what vehicle you were in, provide the names and addresses of anyone in the vehicle with you, state whether your vehicle was equipped

with a video camera, whether the video camera was recording the events of July 17-18, and whether you fired your gun or used your gun to bang on or hit the Rickard vehicle.

ANSWER: **Vance Plumhoff:** operating Vehicle No. 290; I had a civilian ride-along/observer in my unit named Andy Pearce, address unknown; My vehicle was not equipped with a video camera; In response to the use of deadly force against me and the other officers as well as the threat of serious physical injury or death to myself and others presented by the white Honda car driven by Mr. Rickard, upon information and belief, I fired three (3) shots during the incident to end the aforementioned threat and acts of deadly physical force posed by the White Honda, which was necessary under the circumstances. **Jimmy Evans:** Upon information and belief, I was in patrol unit 205 or 206 upon information and belief; my vehicle was not equipped with a video camera; I did not fire my weapon; I did hit the car driven by Mr. Rickard with my weapon in an attempt to gain access to the car and stop the use of deadly force and threat of serious physical injury or death to myself and others caused by the Honda. *See also* statement to Memphis P.D. and Response to Rog. No. 7 above. **Joseph Forthman:** *See attached Statement to Memphis P.D.*; I did not shoot my service weapon; my car, upon information and belief Unit 279, had a video camera and that tape has been provided in Defendants' Initial Disclosures; no one else was in my car. **Troy Galtelli:** Unit 286; my patrol unit was equipped

with a camera and the tape from same has already been provided to Plaintiffs' counsel via Initial Disclosures; I fired my weapon, upon

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REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST NO. 1: Please produce any and all documentation which supports your answers to the preceding answers to Interrogatories. Please be sure to specify which documents you allege support which Interrogatory.

RESPONSE: Upon information and belief, all of the attached documents support the Separate Defendants' responses. However, by attaching said documentation, no admissions of any kind are made and Separate Defendants deny any and all wrongdoing to the extent alleged by Plaintiffs or otherwise. Furthermore, Separate Defendants are not in possession of the entire file possessed by other law enforcement agencies or entities and cannot verify that the attached documents represent such complete files. Rather, the attached documents are those documents in the possession of Separate Defendants which are either proper for discovery responses and are not otherwise covered by attorney-client privilege. Separate Defendants reserve the right to supplement their responses and will do so in accordance with the Federal Rules of Civil Procedure.

REQUEST NO. 2: Please provide a copy of your complete personnel file from your department or

any other police department with whom you worked for in the past 10 years and including, but not limited to, all employment applications, physical and mental examinations, general personnel files, general police personnel files and precinct personnel files.

RESPONSE: OBJECTION. The personnel files of the Separate Defendants are private and contain information of a sensitive and personal nature. However, Separate Defendants will gladly provide full copies of said files, with appropriate redactions of personal identifiers and the names, numbers, and addresses of family members or other persons, upon the entry of an Agreed Protective Order as already discussed by counsel for the parties.

REQUEST NO. 3: Please provide a complete copy of the file from the Internal Affairs Division, Security Squad, or any other division of the City of West Memphis or the West Memphis Police Department which reflects the investigation of this matter by Internal Affairs, Security Squad or any other such division empowered to investigate officer misconduct or citizen complaint including, but not limited to, all pleadings, forms, edicts, opinions, disciplinary action, appeals, notices of hearing, photographs, videotapes, diagrams, drawings, audio tapes, inter-office memoranda, scientific testing results, fingerprinting results, physical evidence, weapons, affidavits of complaint, requests for medical attention, etc.

RESPONSE: This matter was investigated by the Memphis Police Department and/or other entities

and Chief of Police Robert Paudert spoke with some of the officers regarding the incident and permitted the Memphis Police to investigate the incident. *See Incident Report* of Charles McDougal; Also *see* video tapes provided in Defendant' [sic] Initial Disclosures. Further, to the extent that the attached documents contain portions of the investigative file of the Memphis Police Department, then said documents are responsive to the request.

REQUEST NO. 4: Please provide a copy of documents concerning or setting forth criminal charges filed against you, if any, including but not limited to indictments, pleas and/or plea agreements, and requests for pre-trial diversion.

RESPONSE: OBJECTION. The request is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving the objection, to the extent Separate Defendants are in possession of such materials they are attached. However, Separate Defendants deny any and all wrongdoing to the extent alleged by said documents, and specifically deny committing any criminal action related to the incident which forms the basis for this lawsuit. Rather, any attached documents are provided as requested and only to the extent Separate Defendants are in possession of such.

REQUEST NO. 5: Please provide a copy of all medical records and bills pertaining to any injury or treatment resulting from the incident which is the subject matter of this litigation which includes, but is

not limited to, all documents filed in support of any claim for worker's compensation, on-the-job injury or any other medical or psychological evaluation.

RESPONSE: **Vance Plumhhoff:** *See attached Medical Records* which were incurred as a result of being rammed, while seated in my patrol unit, by the Honda driven by Donald Rickard.

REQUEST NO. 6: Please produce a copy of all your portable or cellular telephone bills showing call activity on July 17, 2004 from 9 p.m. to July 18, 2004 at 9 p.m.

RESPONSE: Separate Defendants are not in possession of such bills. However, Separate Defendants each have made inquiry to their cellular providers in an attempt to obtain said records. This Response will be supplemented once further information is learned, but only to the extent such information is learned.

REQUEST NO 7: Please provide a copy of any statement you have given or a copy of any recorded interview you have given in connection with the events of July 17, 2004-July 18, 2004 involving the pursuit of the Rickard vehicle into Memphis, Tennessee.

RESPONSE: *See attached Miscellaneous Documents*; *See also Defendants' Initial Disclosures.* Separate Defendants object to the extent that this request seeks matters covered by the attorney-client privilege.

REQUEST NO. 8: Please produce any and all photographs, videotapes, diagrams, etc. which relate in any way to the incident which is the subject matter of this litigation, including videotapes from dash-mounted cameras in police vehicles and photographs of the Rickard vehicle and the condition of the body of Mr. Rickard and Ms. Kelly Allen at the scene of the crash of the Rickard vehicle on July 18, 2004.

RESPONSE: *See attached* Photographs and CDs containing photographs. *See also* Videotapes provided during initial disclosures to Plaintiffs.

REQUEST NO. 9: Please produce a complete copy of any law enforcement handbook or manual issued or distributed to you by the City of West Memphis prior to the time of the incident which is the subject matter of the Complaint and which was in force at the time of the pursuit and death of Donald Rickard, including any written policies concerning vehicular pursuit/chase of suspects and the use of deadly force toward suspects.

RESPONSE: *See attached West Memphis Police Department Policies Manual* which was in force prior to 11/15/2007.

REQUEST NO. 10: Please produce a copy of all of your law enforcement training records.

RESPONSE: *See attached Training Records.*

REQUEST NO. 11: Please produce a copy of all documents, memoranda, directives or any other communication relating to the checkpoint or saturation

for traffic violators by West Memphis police department for July 17, 2004.

RESPONSE: *See Response Above. Not applicable.*

Respectfully submitted,

VANCE PLUMOFF [sic],
TONY [sic] GALTELLI,
JOHN GARDNER, LANCE
ELLIS, JIMMY EVANS,
JOSEPH FORTHAM [sic]
and ROBERT PAUDERT,
all individually and in
their official capacities

SEPARATE DEFENDANTS

By:/s/ Michael Mosley

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[Illegible]

OFFICE OF THE COUNTY MEDICAL EXAMINER
1060 Madison Avenue
MEMPHIS, TENNESSEE 38104
REPORT OF INVESTIGATION BY
COUNTY MEDICAL EXAMINER

Case No C-2004-2797
Autopsy Y

DECEDENT NAME KELLY (First) ALLEN (Middle) (Last) RACE: CAU SEX: FEMA AGE: 44YR

HOME ADDRESS: (Number and Street) MEMPHIS (City) TN (State) (Zip) SHELBY (County)

TYPE OF DEATH: *(Check one only)*
Violent ☑ Casualty ☐ Suicide ☐
Suddenly when in apparent health ☐ Found Dead ☐
In Prison ☐ Suspicious, unusual, or unnatural ☐ Cremation ☐
Comment GSW and MVC
If Motor Vehicle Accident Check One: Driver ☐ Passenger ☑
Pedestrian ☐ Unknown ☐

Notification by _____ Investigating Agency MPD

DESCRIPTION OF BODY: Clothed ☑ Unclothed ☐ Partly Clothed ☐
Circumcised Yes ☐ No ☐

Eyes Brn Hair Brn Mustache _____ Beard _____

Weight 148.5 Pounds Length 65 Inches Body Temp _____ Date and Time 18-JUL-2004 04:53

Rigor: Yes ☐ No ☐ Lysed ☐ Livor Color _____
Fixed ☐ Non-Fixed ☐

Marks and Wounds

see autopsy
diagram

[Diagram Omitted In Printing]

narrative: shot in head during car chase,
passenger motor vehicle crash.

PROBABLE CAUSE OF DEATH	MANNER OF DEATH	DISPOSITION OF CASE
GSW to head and multiple blunt force injuries	*(Check one only)* ☐ Accident ☐ Natural ☐ Suicide ☐ Unknown ☑ Homicide ☐ Pending	1. Not a medical examiner case ☐ 2. Autopsy ☑ Yes ☐ No Pathologist /s/ [Illegible]

I hereby declare that after receiving notice of the death described herein, I took charge of the body and made inquiries regarding the cause of death in accordance with Section 38-7-101-38-7-116 Tennessee Code Annotated; and that the information contained herein regarding such death is true and correct to the best of my knowledge and belief

7-18-04	SHELBY	Thomas [Illegible] MD
Date	County of Appointment	Signature of County Medical Examiner

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PERSONAL HISTORY: Suicide attempts ☐ Suicide threats ☐ Hobbies, aptitude and skills with firearms, chemicals, etc. ☐

Domestic, premarital or marital conflicts ☐ Financial or business reverses ☐

Social or religious conflicts ☐ Legal difficulties ☐

Criminal record ☐ Unemployment ☐ Fear of disease ☐ Other (specify) _____

CONDUCT BEFORE DEATH: Efforts to prevent help ☐ Efforts to obtain help ☐

Suicide attempt: Admitted ☐ Denied ☐

Refusal to talk ☐ Written declaration of intended suicide ☐ Accusations against others ☐

Other (specify) _____

	LAST SEEN ALIVE	INJURY OR ILLNESS	DEATH	DISCOVERY	MEDICAL EXAMINER NOTIFIED	VIEW OF BODY
DATE			7-18-04			7-18-04
TIME			0044			0900

	LOCATION	CITY OR COUNTY	TYPE OF PREMISES (HOSPITAL, HOTEL, HIGHWAY, ETC.)
INJURY OR ONSET OF ILLNESS			
DEATH	Danny Thomas &	Jackson Memphis	Road
VIEWING OF BODY BY MEDICAL EXAMINER	RFC		

MEDICAL ATTENTION AND HOSPITAL OR INSTITUTIONAL CARE

NAME OF PHYSICIAN OR INSTITUTION	ADDRESS/PHONE	DIAGNOSIS

CIRCUMSTANCES OF DEATH

	NAME	ADDRESS
FOUND DEAD BY		
LAST SEEN ALIVE BY		
WITNESS TO INJURY OR ILLNESS AND DEATH		

NARRATIVE SUMMARY OF CIRCUMSTANCES SURROUNDING DEATH:

car chase c̄ police. Passenger in vehicle.
Driver shot multiple times but sped away. Passenger also shot, car wrecked shortly after.

THE UNIVERSITY OF TENNESSEE
HEALTH SCIENCE CENTER
REGIONAL FORENSIC CENTER
1060 MADISON AVENUE
MEMPHIS, TENNESSEE 38104-2106

ACCREDITED BY THE NATIONAL ASSOCIATION OF MEDICAL EXAMINERS 1978 THROUGH 2008

AUTOPSY REPORT

CASE NO. **C04-2797** COUNTY OF: **Shelby**

NAME OF DECEDENT: **Kelly Allen**
RACE: **White** SEX: **Female** AGE: **44**

COUNTY MEDICAL EXAMINER: **Thomas Deering, M.D.**
ADDRESS: **1060 Madison Ave, Memphis, TN 38104**

DISTRICT ATTORNEY GENERAL: **Honorable William L. Gibbons**
ADDRESS: **201 Poplar Avenue Memphis, TN 38103**

ANATOMICAL DIAGNOSIS.

1. **Gunshot wound to the head**
2. **Multiple blunt force injuries**
3. **Skull base fractures**
4. **Multiple rib fractures**
5. **Fractured pelvis**

CAUSE OF DEATH. **Gunshot wound to the head and multiple blunt force injuries**

NARRATIVE OF FINDINGS.

Death was due to the combined effects of a gunshot wound to the head inflicted during a police chase and multiple blunt force

injuries from a subsequent motor vehicle crash.

THE PURPOSE OF THIS REPORT IS TO PROVIDE A CERTIFIED OPINION TO THE COUNTY MEDICAL EXAMINER AND THE DISTRICT ATTORNEY GENERAL.

THIS ALSO SERVES AS A BILL OF COST FOR FACILITY USE AND AUTOPSY SERVICES PERFORMED ON THE DECEDENT BY ORDER OF THE DISTRICT ATTORNEY GENERAL OR MEDICAL EXAMINER UNDER PROVISIONS OF TENNESSEE CODE ANNOTATED, 38-7-111

Date: 9/2/2004 Signature. Thomas Deering, M.D.
Thomas Deering, M.D.
Address. 1060 Madison Avenue
Memphis, TN 38104

FINAL PATHOLOGIC DIAGNOSIS

PRIMARY SERIES

I Gunshot wound to the head

A. Gunshot Wound "A", left posterior head, 59 inches above the heel, 1 inch superior to and 2 3/4 inches posterior to the superior attachment of the left ear The wound is a roughly oval shaped entrance wound with 2 marginal tears showing an abrasion ring and a circumferential contusion. No soot or stipple is seen on the skin. The bullet traverses skin and soft tissue and produces a fracture of the left parietal bone with associated radiating fractures, lacerating cranial nerves and the vessels of the Circle of Willis and lacerating the left cerebellar peduncle with the bullet coming to rest in the center area of the

brain. The wound direction is posterior to anterior and left to right. The bullet is recovered and retained for evidence.

II Multiple blunt force injuries

A. Blunt force injuries to the head

1. Right sided facial fractures
2. Nasal bone fracture
3. Fractures of the skull base focused in the right anterior and middle fossae
4. Right temporal pole subarachnoid hemorrhage
5. Lacerated brain in the right inferior frontal lobe
6. Mild subarachnoid hemorrhage over the convexities bilaterally
7. Multiple small bite hemorrhages of the tongue
8. Fractured left greater cornu of the hyoid bone

B. Blunt force injuries to the chest

1. Multiple fractured ribs including left ribs 1 through 6 posteriorly and 1 through 10 laterally and right ribs 1 through 8 in a posterior to anterior distribution going from top to bottom.
2. Lacerated aorta
3. Hemopericardium, 150 ml
4. Bilateral hemothoraces, 120 ml total

C. Blunt trauma to the pelvis

1. Multiple fractures of the pelvis at the symphysis pubis and the left sacroiliac Joint

D. Associated conditions
   1. Pale anemic viscera
   2. Moderate pulmonary edema
   3. Aspiration of blood
   4. Left radius and ulna fractures
   5. Right tibia and fibula fractures
   6. Dislocated right ankle
   7. Multiple contusions and abrasions of the skin

SECONDARY SERIES
1 Bilateral breast implants

LABORATORY
Toxicology report is attached.

AUTOPSY NO: 04-2797

IDENTIFICATION: A forensic ID band identifies the body as 2004-2797

CLOTHING: white tank top, black jeans, one white sock laying on jeans

IDENTIFYING MARKS, SCARS, AND TATTOOS: See Diagram # 1

EVIDENCES OF MEDICAL INTERVENTION: None

RADIOGRAPHY: X-rays of the head show a bullet in the center of the head.

EXTERNAL EXAMINATION

Injuries, if present, are illustrated on the body diagram(s). The body is that of a now nude, 65 inch tall, 148.5 pound well-nourished, well-developed 44 year old white female who looks appropriate for the stated age. Rigor mortis is absent, livor mortis is purple and fixed and the skin is cool to the touch. The heed is normocephalic and traumatized, see diagram. The hair is brown with blond frosts. The face shows a purple contusion across the bridge of the nose. The eyes show brown irides and the sclerae are clear. No petechiae are seen. The ears are normal. The nose is fractured to palpation. The mouth shows natural dentition in good repair. No fluid is draining from the mouth or nose. The neck has no distended veins and there is no adenopathy palpated. The chest shows a normal anterior-posterior diameter. Palpable rib fractures are identified. The breasts are symmetrical and show no masses or dimpling. Bilateral water filled breast implants are present. The abdomen is flat and soft, and no masses are palpable. The genitalia are those of a normal female, and no trauma is identified. The anus and perineum appear normal. The back is normal. The upper extremities show no cyanosis or clubbing of the fingernail beds. The lower extremities show no peripheral edema. The skin shows no jaundice.

INTERNAL EXAMINATION

The body is opened with the usual "Y"-shaped and intermastoid incisions. On opening the thorax, the lungs are partially collapsed. The pleural surfaces are smooth and shiny and there are bilateral hemothoraces, 45 ml. on the right and 75 ml. on the left. Pleural adhesions are absent. The thymus is not identified. On opening the pericardium, the surfaces are smooth and shiny and there is 150 ml. of blood. On opening the abdomen, the viscera are in their usual locations and the serosa show a smooth and shiny surface. No free fluid is present. Abdominal adhesions are absent.

RESPIRATORY SYSTEM: Injuries, if present, are as diagrammed. The epiglottis is normal. The larynx is intact. The vocal cords are normal. The mucosa of the larynx, trachea, and bronchi is tan and there is aspirated blood in the lumen. The right and left lungs are 660 and 540 grams, respectively. Severe anthracosis is present. No pleural petechiae are seen. The cut surface of the lung is brown-gray and there is moderate pulmonary edema fluid identified. The lungs are evenly subcrepitant and mild atelectasis is present. No areas of consolidation are seen. No emphysema is seen. The hilar areas contain normal structures. The diaphragm is normal.

CARDIOVASCULAR SYSTEM: Injuries, if present, are as diagrammed. The 320 gram heart has a normal size and shape. The epicardium is smooth, shiny and translucent. The coronary arteries show no

atherosclerosis. The coronary artery ostia are patent. The myocardium is uniformly brown and shows no scars. The thickness of the right and left ventricles are 0.5 and 1.3 cm. respectively. The endocardium is thin and translucent. No interventricular septal defects or congenital abnormalities are seen. The valves show no perforations or vegetations. The chordae tendinsae are thin and not fused. The papillary muscles show no fibrosis. The aorta is lacerated distal to the arch with associated soft tissue hemorrhage. It shows no atherosclerosis. The ostia of the major branches are patent. The pulmonary arteries show no thromboemboli or atherosclerosis. The inferior vena cava is normal.

HEPATOBILIARY SYSTEM: Injuries, if present, are as diagrammed. The 2020 gram liver has a smooth thin capsule. The cut surface is pale tan-brown and firm. The intrahepatic ducts are not dilated. There is no nodularity or increased fibrosis. The extrahepatic biliary tree is patent, free of stones and not dilated. The gallbladder has a shiny surface and its wall is evenly thin throughout. It contains dark green-brown viscous bile and no stones. The mucosa is green and velvety.

DIGESTIVE TRACT: Injuries, if present, are as diagrammed. The tongue shows multiple bite hemorrhages. The oropharynx shows no regurgitated material. The esophagus has a pale, opaque and smooth mucosa. The stomach contains 200 ml. of brown liquid. The stomach mucosa is autolyzed. The wall has an even thickness. The small bowel shows no

abnormalities. The colon and rectum are free of abnormalities. They are filled with soft green stool. The appendix is present. The mesenteric and periaortic lymph nodes are not enlarged. The pancreas is soft and shows pale tan cut surface with a normal duct.

HEMATOPOIETIC SYSTEM: Injuries, if present, are as diagrammed. The 140 gram spleen has a wrinkled, light gray capsule and a cut surface that is brown with white specks. No adenopathy is identified within the body.

ENDOCRINE SYSTEM: Injuries, if present, are as diagrammed. The two adrenals are found in their usual locations and on cut surface show golden yellow cortices and gray to brown medulla. No nodularity is identified. The thyroid shows a normal configuration, the cut surface is slightly gelatinous, pale brown and without nodularity or fibrosis.

MUSCULOSKELETAL SYSTEM: The skeletal muscle is dark red. The muscles of the neck and paravertebral areas show no hemorrhages. The hyoid bone is fractured on the left. The ribs and bones of the pelvis are fractured as diagrammed. The extremities show the above described fractures. The bone marrow is brick red, no nodules are seen and the bony trabeculae are normal in appearance.

GENITOURINARY SYSTEM: Injuries, if present, are as diagrammed. The right and left kidneys are 130 and 130 grams, respectively. The capsules strip easily revealing a smooth cortical surface. The cut

surface is tigroid and mottled red-tan. The thickness of the cortices is normal. The corticomedullary junction is sharply demarcated. The papiliae are not blunted. The pelvic calyceal system is lined by a light gray mucosa and shows no stones. The ureters have an even diameter. The bladder is normal and has a smooth mucosa. The bladder contains 0 mL of urine.

The vaginal cuff is normal. The ectocervix shows a smooth mucosa. The cervical os is linear and smooth. The ovaries and fallopian tubes are present bilaterally and are normal in size for the patient's age. No cysts or adhesions are present. The fallopian tubes are intact. The uterus has a normal contour and size. The endometrium is less than 1 mm thick. The myometrium is normal and free of masses. The endocervix shows no gross lesions. No pregnancy is identified.

CENTRAL NERVOUS SYSTEM: Injuries, if present, are as diagrammed. On opening the scalp, the subgaleal fascia shows hemorrhages. The calvarium and base of the skull are of normal thickness and show fractures. The dura is lacerated with no evidence of hemorrhage. The 1275 gram brain has a semi-soft consistency. The meninges are hemorrhagic as described. The cerebral hemispheres are symmetrical with a normal gyral pattern. There is no uncal or cerebellar tonsillar herniation. The vessels at the base of the brain have a normal distribution and show no atherosclerosis. The cranial nerves appear intact. Serial sectioning of the cerebrum, cerebellum and brain stem show the injuries described in the

pathologic diagnoses list. The cerebrospinal fluid is bloody. The ventricles are normal in size. The pituitary gland is normal in size without masses.

The middle ears show hemorrhage on the right, associated with fracture.

No tissue is submitted for histology.

Specimens are obtained and submitted for toxicology.

TOXICOLOGY: Results will be submitted under a separate report.

Autopsy No. 24-2797

VIEWS OF THE BODY

white tank top, black jeans, on white sock layers, no shoes

Brown hair, freckled blond.

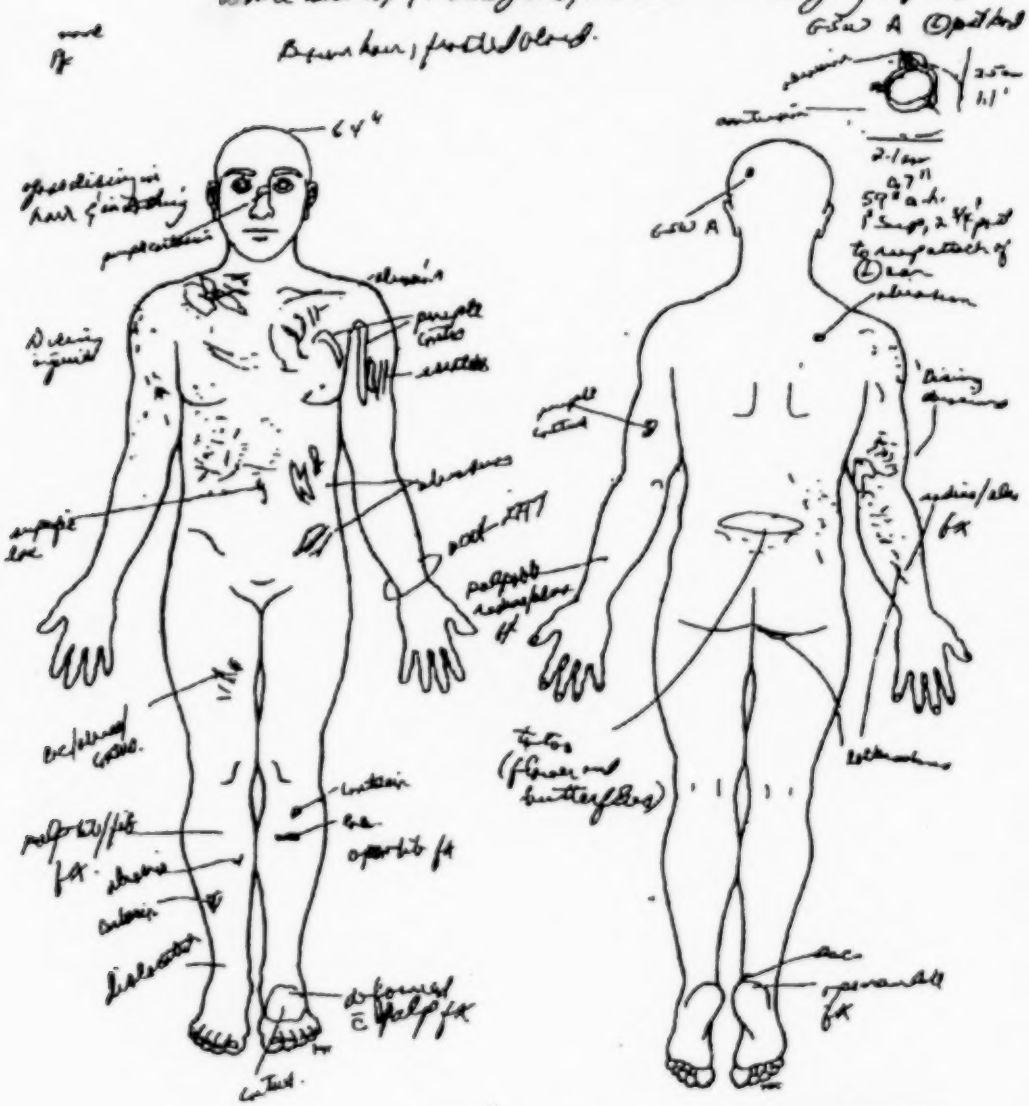

DIAGRAM #1

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Autopsy No. 07-477

VIEWS OF THE HEAD

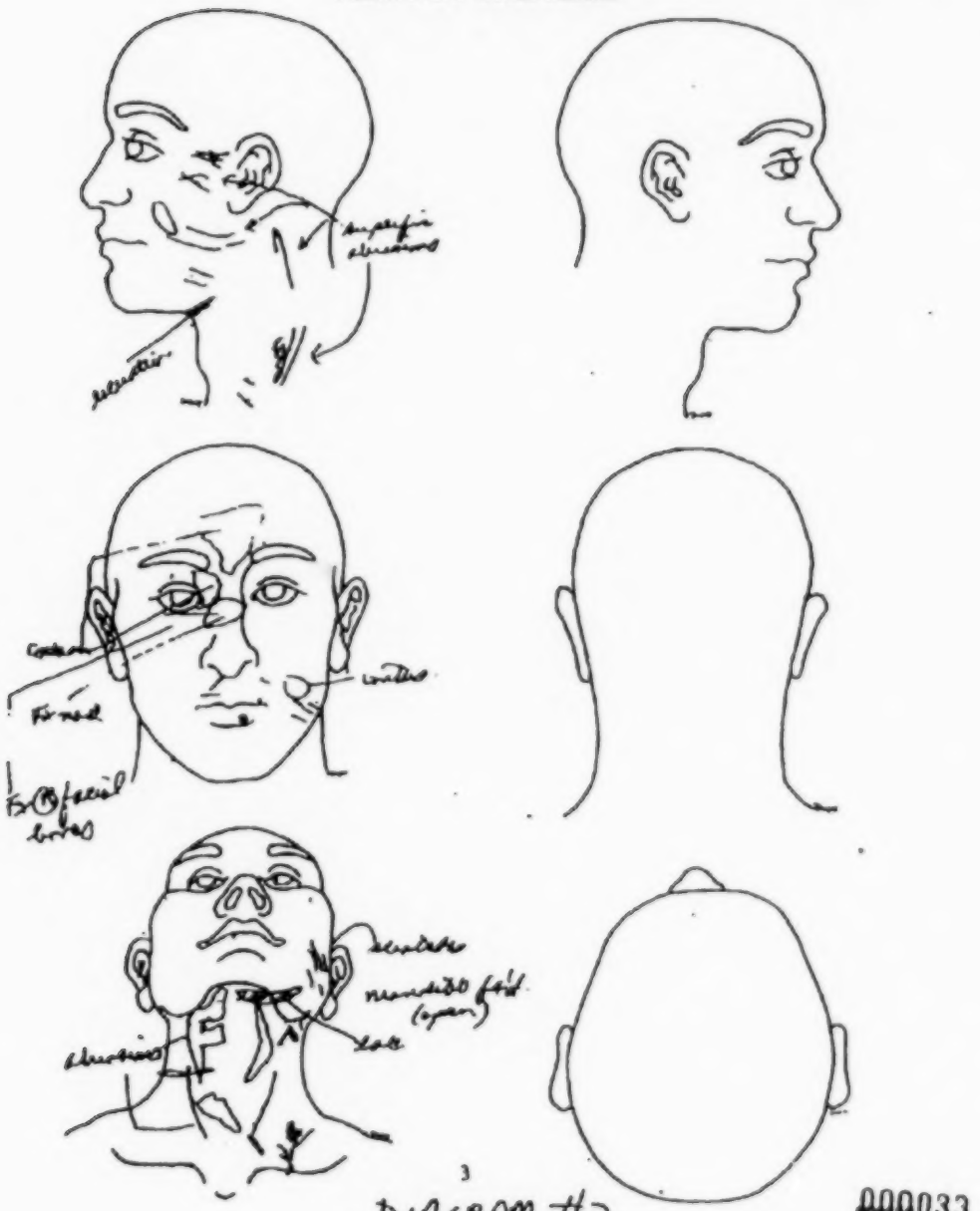
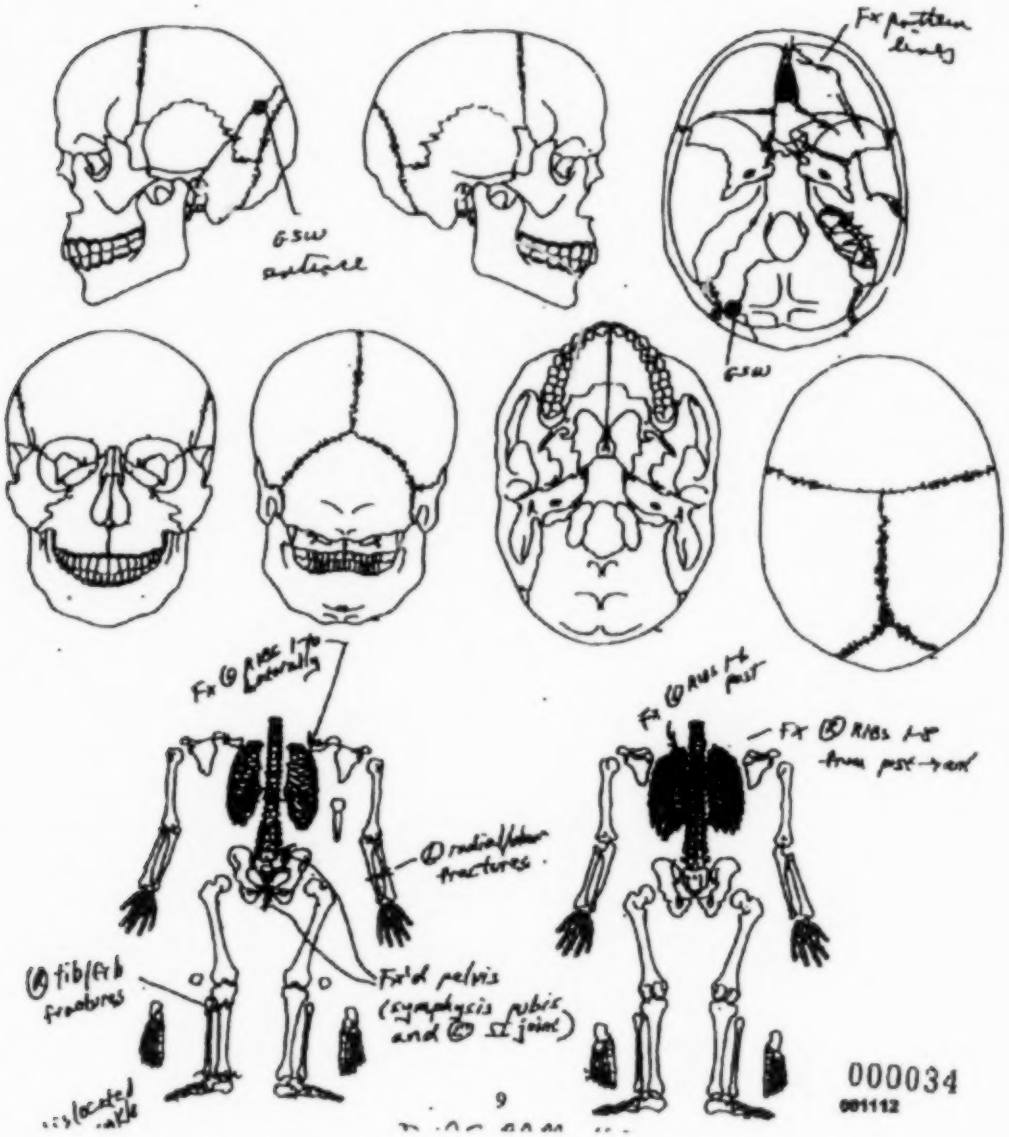


DIAGRAM #2

Autopsy No. 04-2797

SKELETAL SYSTEM:

☐ Skull ☐ Ribs ☐ Vertebrae ☐ Extremities ☐ Pelvis ☐ Bone Marrow



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UNIVERSITY OF TENNESSEE
HEALTH SCIENCE CENTER
REGIONAL FORENSIC CENTER

AUTOPSY PROTOCOL

NAME: **Kelly Allen** CASE NO. C04-2797

RACE: **White** SEX: **Female** AGE: **44**

MICROSCOPIC SUMMARY

None.

[Positive id made by prints]

OFFICE OF THE COUNTY MEDICAL EXAMINER
1060 Madison Avenue
MEMPHIS, TENNESSEE 38104
REPORT OF INVESTIGATION BY COUNTY MEDICAL EXAMINER

Case No 2004-2796
Autopsy Y

DECEDENT NAME ~~UNK~~ Donald D. Rickard RACE: CAU SEX: MALE AGE: 44YR
First Middle Last 2.23.6

HOME ADDRESS: 6396 Gilliam MEMPHIS TN SHELBY
Number and Street City State Zip County

TYPE OF DEATH: (Check one only)
Violent ☑ Casualty ☐ Suicide ☐
Suddenly when in apparent health ☐ Found Dead ☐
In Prison ☐ Suspicious, unusual, or unnatural ☐ Cremation ☐
Comment GSW and MVC
If Motor Vehicle Accident Check One: Driver ☑ Passenger ☐
Pedestrian ☐ Unknown ☐

Notification by _____ Investigating Agency MPD

DESCRIPTION OF BODY: Clothed ☑ Unclothed ☐ Partly Clothed ☐
Circumcised Yes ☑ No ☐

Eyes _____ Hair Gray Mustache Yes Beard Yes

Weight 174.5 Pounds Length _____ Inches Body Temp _____ Date and Time 18-JUL-2004 04:45

Rigor: Yes ☐ No ☐ Lysed ☐ Livor Color _____
Fixed ☐ Non-Fixed ☐

Marks and Wounds

see autopsy diagram

[Diagram Omitted In Printing]

PROBABLE CAUSE OF DEATH	MANNER OF DEATH	DISPOSITION OF CASE
multiple GSW's	(Check one only) ☐ Accident ☐ Natural ☐ Suicide ☐ Unknown ☑ Homicide ☐ Pending	1. Not a medical examiner case ☐ 2. Autopsy ☑ Yes ☐ No Pathologist /s/ Deering

I hereby declare that after receiving notice of the death described herein, I took charge of the body and made inquiries regarding the cause of death in accordance with Section 38-7-101-38-7-116 Tennessee Code Annotated; and that the information contained herein regarding such death is true and correct to the best of my knowledge and belief

7-18-04	SHELBY	Thomas Deering MD
Date	County of Appointment	Signature of County Medical Examiner

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PERSONAL HISTORY: Suicide attempts ☐ Suicide threats ☐ Hobbies, aptitude and skills with firearms, chemicals, etc. ☐

Domestic, premarital or marital conflicts ☐ Financial or business reverses ☐

Social or religious conflicts ☐ Legal difficulties ☐

Criminal record ☐ Unemployment ☐ Fear of disease ☐ Other (specify) _____

CONDUCT BEFORE DEATH: Efforts to prevent help ☐ Efforts to obtain help ☐

Suicide attempt: Admitted ☐ Denied ☐

Refusal to talk ☐ Written declaration of intended suicide ☐ Accusations against others ☐

Other (specify) _____

	LAST SEEN ALIVE	INJURY OR ILLNESS	DEATH	DISCOVERY	MEDICAL EXAMINER NOTIFIED	VIEW OF BODY
DATE			7-18-04			7-18-04
TIME			0044			0845

	LOCATION	CITY OR COUNTY	TYPE OF PREMISES (HOSPITAL, HOTEL, HIGHWAY, ETC.)
INJURY OR ONSET OF ILLNESS	Danny Thomas &	Jackson Memphis	road
DEATH	778 Jackson	Memphis	road
VIEWING OF BODY BY MEDICAL EXAMINER	RFC		

MEDICAL ATTENTION AND HOSPITAL OR INSTITUTIONAL CARE

NAME OF PHYSICIAN OR INSTITUTION	ADDRESS/PHONE	DIAGNOSIS

CIRCUMSTANCES OF DEATH

	NAME	ADDRESS
FOUND DEAD BY		
LAST SEEN ALIVE BY		
WITNESS TO INJURY OR ILLNESS AND DEATH		

NARRATIVE SUMMARY OF CIRCUMSTANCES SURROUNDING DEATH:

Driver in car chase. Shot multiple times. Also crashed the car. Passenger died also.

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1060 MADISON AVENUE
MEMPHIS, TENNESSEE 38104-2106

ACCREDITED BY THE NATIONAL ASSOCIATION
OF MEDICAL EXAMINERS 1978 THROUGH 2008

AUTOPSY REPORT

CASE NO: **C04-2796** COUNTY OF: **Shelby**

NAME OF DECEDENT: **Donald Rickard**

RACE: **White** SEX: **Male** AGE: **44**

COUNTY MEDICAL EXAMINER: **Thomas Deering, M.D.**

ADDRESS: **1060 Madison Ave.**
Memphis, TN 38104

DISTRICT ATTORNEY GENERAL: **Honorable**
William L. Gibbons

ADDRESS: **201 Poplar Avenue**
Memphis, TN 38103

ANATOMICAL DIAGNOSIS:

1. **Multiple gunshot wounds**
2. **Multiple blunt force injuries**
3. **Hinge fracture of the skull**
4. **Pulmonary aspiration of blood**
5. **Multiple skin tattoos**

CAUSE OF DEATH: **Multiple gunshot wounds**

NARRATIVE OF FINDINGS: **Death was due to being shot by other(s). The decedent was shot and drove his car into a brick wall.**

THE PURPOSE OF THIS REPORT IS TO PROVIDE A CERTIFIED OPINION TO THE COUNTY MEDICAL EXAMINER AND THE DISTRICT ATTORNEY GENERAL

THIS ALSO SERVES AS A BILL OF COST FOR FACILITY USE AND AUTOPSY SERVICES PERFORMED ON THE DECEDENT BY ORDER OF THE DISTRICT ATTORNEY GENERAL OR MEDICAL EXAMINER UNDER PROVISIONS OF TENNESSEE CODE ANNOTATED, 38-7-111

Date: 10/1/2004

Signature: /s/ Thomas Deering , M.D.
Thomas Deering, M D
Address: 1060 Madison Avenue
Memphis, TN 38104

FINAL PATHOLOGIC DIAGNOSIS

PRIMARY SERIES

I. Multiple gunshot wounds (See Diagrams 1-4)

A. Multiple gunshot wounds to the right arm (GSW's A through I, Y)

1. Gunshot Wound "A", right upper arm, superior and lateral

Entrance wound: The entrance wound is a roughly rectangular shaped wound with an asymmetric abrasion ring showing no soot or stipple on the skin.

Wound path: The bullet traverses skin and soft tissue producing a fracture of the right humerus and ending in a bullet labeled as "Number 10". The bullet is recovered and retained for evidence.

Wound direction: Right to left

2. Gunshot Wound "B", right upper arm, lateral

   Entrance: The entrance wound is an irregular wound showing an asymmetric abrasion and no soot or stipple on the skin

   Wound path: The bullet traverses skin and soft tissue only.

   Exit: The bullet exits at Gunshot Wound "F", right upper arm, medial, which is an oval shaped wound,

   Wound direction: Right to left and posterior to anterior

3. Gunshot Wound "C", right upper arm, inferior and lateral

   Entrance: The entrance wound is a roughly round to oval wound with a nearly circumferential abrasion ring showing no soot or stipple on the skin.

   Wound path: The bullet traverses skin and soft tissue only

   Exit: The bullet exits at Gunshot Wound "Y", right upper arm, posterior.

Wound direction: Right to left and mildly inferior to superior

4. Gunshot Wound "D", right upper arm, inferior and lateral

   Entrance: The entrance wound is an irregular oval shaped wound with irregular abrasion margins showing no soot or stipple on the skin.

   Wound path: A bullet jacket traverses skin and soft tissue to end at a jacket recovered inside the soft tissue of the arm and labeled as Jacket Number "6".

   Wound direction: Right to left and superior to inferior

5. Gunshot Wound "E", right arm, posterior elbow area

   Entrance wound: The entrance wound is a roughly oval shaped, slightly asymetric entrance wound with an asymmetric abrasion ring showing a flap of tissue remaining in the center of the wound ("cookie cutter" appearance) No soot or stipple is seen on the skin.

   Wound path: The bullet jacket traverses skin and soft tissue and strikes the bones of the lower arm producing a fracture of the radius and ulna and ends in a bullet jacket labeled as Number "7".

   Wound direction: Superior to inferior

6. Gunshot Wound "G", right lateral forearm

Entrance wound: There is a very irregular entrance with a small focal abrasion and no soot or stipple on the skin. This wound injures soft tissue and skin only and does not end in a metallic fragment (may represent a shrapnel injury that bounced back away from the skin)

Wound direction: Superior to inferior

7. Gunshot Wound "H", right forearm, dorsal

   Entrance: The wound is an irregular entrance wound with an asymmetric abrasion ring.

   Wound path: The bullet traverses skin and soft tissue only and does not end in a foreign metal object, similar to Gunshot Wound "G"

   Wound direction: Superior to inferior

8. Gunshot Wound "I", right medial forearm

   Entrance wound: The entrance wound is a round to oval wound with an oval of skin remaining in the center of the wound ("cookie cutter" appearance). No soot or stipple is present on the skin.

   Wound path: The bullet traverses skin and soft tissue to end at a bullet jacket labeled Number "8". The jacket is recovered and retained for evidence.

   Wound direction: Posterior to anterior, mildly and superior to inferior

B. Multiple gunshot wounds to the chest (J through O)

1. Gunshot Wound "J", right upper chest

Entrance wound: The bullet is a roughly oval to slightly tear drop shaped entrance wound with a concentric abrasion ring showing no soot or stipple on the skin.

Wound path: The bullet traverses skin and soft tissue producing a fracture of the right clavicle, lacerating the superior vena cava, lacerating the adjacent portion of the trachea, the esophagus and producing a slit-like laceration in the aortic arch, perforating the left upper lobe of the lung medially, exiting the chest cavity through posterior ribs 6 through 7 intercostal space to end at Bullet Number "4", 52 ½ inches above the heel and 3 ½ inches left of the midline. The bullet is recovered and retained for evidence.

Wound direction: Superior to inferior, anterior to posterior and right to left

2. Gunshot Wound "K", right upper lateral chest

Entrance: The wound entrance is an irregular oval shaped wound with an asymmetric abrasion ring and an asymmetric contusion. No soot or stipple is seen on the skin.

Wound path: The bullet jacket traverses skin and soft tissue only ending at bullet

jacket labeled Number "1". The bullet jacket is recovered and retained for evidence.

Wound direction: Superior to inferior

3. Gunshot Wound "L", left middle chest

Entrance wound: The wound entrance is an irregular shaped entrance wound with a large circumferential abrasion ring showing no soot or stipple on the skin.

Wound path. The bullet traverses skin and soft tissue and enters the chest cavity through the left anterior ribs 4-5 intercostal space, perforating the left lower lobe of the lung distally, perforating the left hemidiaphragm and exiting the chest cavity through posterior ribs 7-8 intercostal space to end at bullet Number "3" in the soft tissue of the left side of the lower chest, 48 inches above the heel and 6 inches left of the midline. The bullet is recovered and retained for evidence to left

4. Gunshot Wound "M", right lower chest lateral

Entrance wound: The bullet is a roughly oval shaped entrance wound with an asymmetric abrasion ring showing no soot or stipple to the skin.

Wound path: There is an irregular metal bullet fragment embedded in the skin inside the entrance wound which is labeled Number "1", 48 ½ inches above the

heel and 6 ½ inches left of the midline. This fragment is recovered and retained for evidence.

5. Gunshot Wound "N", right lower chest

Entrance wound: The bullet is an asymmetric, small entrance wound with a circumferential and tear drop shaped abrasion ring, showing no soot or stipple on the skin.

Wound path: The bullet traverses skin and soft tissue to exit at Gunshot Wound "O".

Exit: Gunshot Wound "O", right lower chest is an oval shaped exit wound with an asymmetric abrasion ring. A small fragment of bone was removed from inside the exit wound labeled "O". No metal fragments were obtained.

Wound direction: Right to left

C. Multiple gunshot wounds to the left arm (GSW's P through U)

1. Gunshot Wound "P", left medial forearm

Entrance wound: The entrance wound is an irregular, roughly triangular shaped defect with a marginal contusion showing no soot or stipple on the skin

Wound path: Bullet traverses skin and soft tissue ending in Bullet Number "2" in the soft tissue of the left upper arm.

Wound direction: Inferior to superior

2. Gunshot Wound "R", left thenar eminence of hand, anterior entrance. The wound is a roughly round to oval entrance wound with no abrasion ring and no soot or stipple on the skin.

   Wound path: The bullet traverses skin and soft tissue producing a fracture of the first phalanx and ending at Bullet Jacket Number "5" found in the soft tissue at the base of the left thumb in the fracture site. The bullet jacket is recovered and retained for evidence

   Wound direction: Anterior to posterior and mildly superior to inferior

3. Gunshot Wound "S", left forearm, superior and posterior

   Entrance: The wound is a roughly oval shaped entrance defect with a circumferential abrasion ring.

   Wound path: The bullet traverses skin and soft tissue to exit at Gunshot Wound "T".

   Exit: Gunshot Wound "T", left forearm posteriorly is an irregular exit wound showing asymmetric abrasions around the margin.

   Wound direction: Superior to inferior

4. Gunshot Wound "U", left wrist posterior and medial

   Entrance wound: Gunshot Wound "U" is an irregular entrance defect with an

asymmetric abrasion ring showing no soot or stipple on the skin.

Wound path: The bullet traverses skin and soft tissue producing a fracture of the [sic]

Exit: Gunshot Wound "Q" at the left wrist, medial and anterior, is an irregular exit wound.

Wound direction: Posterior to anterior

D. Gunshot Wound to the left leg

1. Gunshot Wound "V", left thigh distal and medial

Entrance: The wound entrance is an irregular oval shaped wound with an asymmetric abrasion ring showing no soot or stipple

Wound path: The bullet traverses skin and soft tissue to exit at Gunshot Wound "W".

Exit: Gunshot Wound "W", left thigh distal and lateral is a roughly rectangular shaped exit defect in which a bullet jacket fragment labeled Number "11" is still embedded. The jacket is inside the wound track and is recovered and retained for evidence.

Wound direction: Right to left, mildly superior to inferior

E. Gunshot wound to the head

1. Gunshot Wound "X", right upper neck and chin

Entrance wound: Entrance wound is a roughly oval to rectangular entrance defect showing no soot or stipple on the skin and no abrasion ring

Wound path: The wound is a surface impact only and no bullet fragment or jacket is recovered from the wound. No fracture is associated with the wound.

F. Other associated conditions with the multiple gunshot wounds

1. Pulmonary aspiration of blood in lower lobes bilaterally

2. Pale, anemic viscera

II. Multiple blunt force injuries

A. Blunt force injuries to the head

1. Multiple lacerations to the head

2. Hinge fracture of the skull base

3. Subarachnoid hemorrhages of the cerebellar hemispheres, base of the brain and extending into the 4th ventricle (mild)

B. Blunt force injuries to the chest

1. Bilateral rib fractures, left ribs 1 through 5 anteriorly and right ribs 1 through 10 laterally (no associated hemorrhages)

SECONDARY SERIES

1. Pulmonary emphysema
2. Pulmonary anthracosis, severe
3. Multiple skin tattoos

LABORATORY

Toxicology report is attached.

AUTOPSY NO: 04-2796 Rickard, Donald

IDENTIFICATION: A forensic ID band identifies the body as 2004-2796

CLOTHING: Black long sleeve shirt, navy blue jeans with brown belt, two brown shoes, gray boxer briefs

IDENTIFYING MARKS, SCARS, AND TATTOOS: See Diagram # 1

EVIDENCES OF MEDICAL INTERVENTION: None

RADIOGRAPHY: Multiple x-rays show multiple bullets and bullet jackets including bullet in left arm, bullet in soft tissue on left side of chest, bullet in left upper-lateral chest, jacket in right lateral chest, jacket in left upper left, bullet in left hand, multiple jackets in right lower arm (4 of them) and bullet fragment or jacket in right upper arm.

EXTERNAL EXAMINATION

Injuries, if present, are illustrated on the body diagram(s). The body is that of a now nude, 68.5 inch tall, 174.5 pound well-nourished, well-developed 44 year old white male who looks appropriate for the stated age. Rigor mortis is partially present, livor mortis is purple and fixed and the skin is cold to the touch. The head is normocephalic and traumatized, see diagram The hair is gray. The face shows a mustache and goatee. The eyes show brown irides and the sclerae are clear. No petechiae are seen. The ears are normal. The nose is intact to palpation. The mouth shows natural dentition in good repair. No fluid is draining from the mouth or nose. The neck has no distended veins and there is no adenopethy palpated. The chest shows a normal anterior-posterior diameter. No palpable rib fractures are identified. The abdomen is flat and soft, and no masses are palpable. The genitalia are those of a normal circumcised male with testes descended bilaterally, and no trauma is identified. The anus and perineum appear normal. The back is normal. The upper extremities show no cyanosis or clubbing of the fingernail beds. The lower extremities show no peripheral edema. The skin shows no jaundice. The joints show deformities related to the gunshot wounds in the right arm and the left wrist.

INTERNAL EXAMINATION

The body is opened with the usual "Y"-shaped and intermastoid incisions. On opening the thorax, the lungs are normally expanded. The pleural surfaces are smooth and shiny and there are bilateral hemothoraces (700 ml right and 400 ml left). Pleural adhesions are absent. The thymus is not identified. On opening the pericardium, the surfaces are smooth and shiny and there is a small 15 ml. hemorrhagic pericardial effusion. On opening the abdomen, the viscera are in their usual locations and the serosa show a smooth and shiny surface. No free fluid is present. Abdominal adhesions are present focally in the right lower quadrant.

RESPIRATORY SYSTEM: Injuries, If present, are as diagrammed. The epiglottis is normal. The larynx is intact. The vocal cords are normal. The trachea is lacerated by GSW 'J'. The mucosa of the larynx, trachea, and bronchi is tan and there is aspirated blood in the lumen. The right and left lungs are 570 and 510 grams, respectively. Severe anthracosis is present. No pleural petechiae are seen. The cut surface of the lung is tan-red to purple and there is mild frothy pulmonary edema fluid identified. Aspirated blood is seen in the lower lobes bilaterally. The lungs are hyperinflated and focal atelectasis is present around the gunshot wounds. No areas of consolidation are seen. Moderate emphysema is seen. The hilar areas contain normal structures. The left hemidiaphragm is lacerated by GSW 'L'.

CARDIOVASCULAR SYSTEM: Injuries, if present, are as diagrammed. The 390 gram heart has a normal size and shape. The epicardium is smooth, shiny and translucent. The coronary arteries show no atherosclerosis. The coronary artery ostia are patent. The myocardium is uniformly brown and shows no scars. The thickness of the right and left ventricles are 0.5 and 1.6 cm. respectively. The endocardium shows a contusion is the left atrium. No interventricular septal defects or congenital abnormalities are seen. The valves show no perforations or vegetations. The chordae tendineae are thin and not fused. The papillary muscles show no fibrosis. The aorta show a slit-like laceration in the arch. It shows no atherosclerosis. The ostia of the major branches are patent. The pulmonary arteries show no thromboemboli or atherosclerosis. The inferior vena cava is normal.

HEPATOBILIARY SYSTEM: Injuries, if present, are as diagrammed. The 1500 gram liver has a smooth thin capsule. The cut surface is tan-brown and firm. The intrahepatic ducts are not dilated. There is no nodularity or increased fibrosis. The extrahepatic biliary tree is patent, free of stones and not dilated. The gallbladder has a shiny surface and its wall is evenly thin throughout. It contains dark green-brown viscous bile and no stones. The mucosa is green and velvety.

DIGESTIVE TRACT: Injuries, if present, are as diagrammed. The tongue is normal. The oropharynx shows no regurgitated material. The esophagus is

focally lacerated by GSW 'J'. The stomach contains 50 ml. of green-brown liquid. The stomach mucosa is autolyzed. The wall has an even thickness. The small bowel shows no abnormalities. The colon and rectum are free of abnormalities. They are filled with soft green stool. The appendix is surgically absent. The mesenteric and periaortic lymph nodes are not enlarged. The pancreas is soft and shows a tan, lobulated cut surface with a normal duct.

HEMATOPOIETIC SYSTEM: Injuries, if present, are as diagrammed. The 90 gram spleen has a wrinkled, light gray capsule and a cut surface that is purple with white specks. No adenopathy is identified within the body.

ENDOCRINE SYSTEM: Injuries, if present, are as diagrammed. The two adrenals are found in their usual locations and on cut surface show golden yellow cortices and gray to brown medulla. No nodularity is identified. The thyroid shows a normal configuration, the cut surface is slightly gelatinous, pale tan-brown and without nodularity or fibrosis.

MUSCULOSKELETAL SYSTEM: The skeletal muscle is dark red. The muscles of the neck and paravertebral areas show hemorrhages related to GSW 'J'. The hyoid bone is intact. The right clavicle is fractured by GSW 'J'. Multiple rib fractures are listed above. The vertebra and bones of the pelvis are intact. The bone marrow is brick red, no nodules are seen and the bony trabeculae are normal in appearance.

GENITOURINARY SYSTEM: Injuries, if present, are as diagrammed. The right and left kidneys are 125 and 110 grams, respectively. The capsules strip easily revealing a smooth cortical surface. The cut surface is tigroid and mottled red-tan. The thickness of the cortices is normal. The corticomedullary junction is sharply demarcated. The papillae are not blunted. The pelvic calyceal system is lined by a light gray mucosa and shows no stones. The ureters have an even diameter. The bladder is normal and has a smooth mucosa. The bladder contains less than 2 mL of urine.

The prostate has a finely granular, light gray-tan cross cut surface. The periprostatic veins show no thrombi. The urethra through the prostate is patent. No nodularity or obstruction is identified. The seminal vesicles are normal. The testes are present in the scrotum. Cross sections show a tan uniform surface and the tubules strip to a length greater than 1 cm. No trauma is identified.

CENTRAL NERVOUS SYSTEM: Injuries, if present, are as diagrammed. On opening the scalp, the subgaleal fascia shows small hemorrhages along the radiating fracture lines. The calvarium and base of the skull are of normal thickness and show a hinge fracture (illustrated in Diagram #5). The dura is intact, smooth and glistening with minimal epidural hemorrhage associated with the basilar skull fracture. The 1325 gram brain has a semi-soft consistency. The meninges show hemorrhages around the cerebellar hemispheres and at the base of the brain

with extension into the fourth ventricle. The cerebral hemispheres are symmetrical with a normal gyral pattern. There is no uncal or cerebellar tonsillar herniation. The vessels at the base of the brain have a normal distribution and show no atherosclerosis. The cranial nerves appear intact. Serial sectioning of the cerebrum, cerebellum and brain stem show no hemorrhages or focal lesions The cerebrospinal fluid is bloody. The ventricles are normal in size. The pituitary gland is normal in size without masses.

The middle ears are fractured bilaterally

No tissue is submitted for histology.

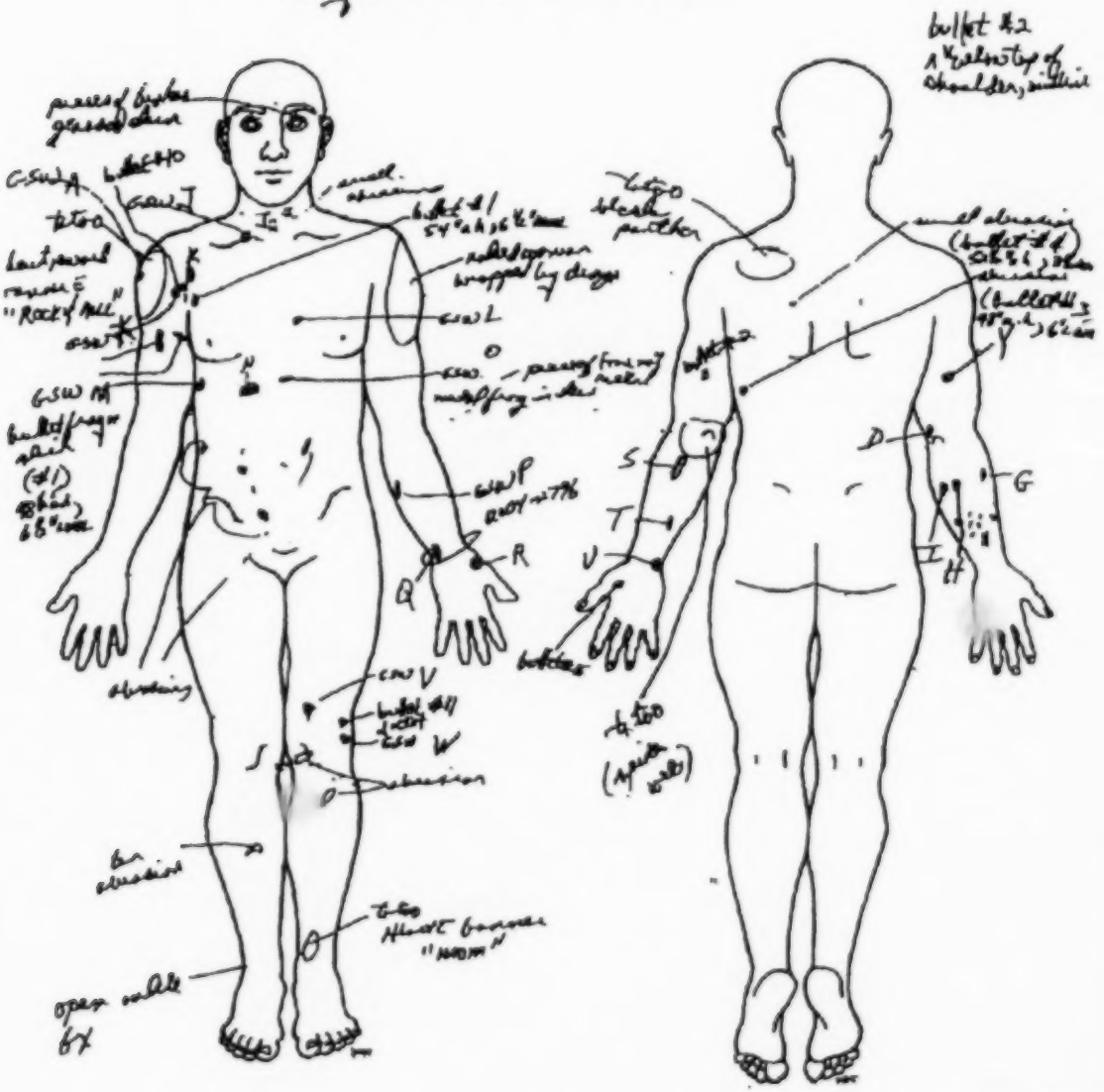
Specimens are obtained and submitted for toxicology.

TOXICOLOGY: Results are submitted under a separate report.

Autopsy No. 04-2796

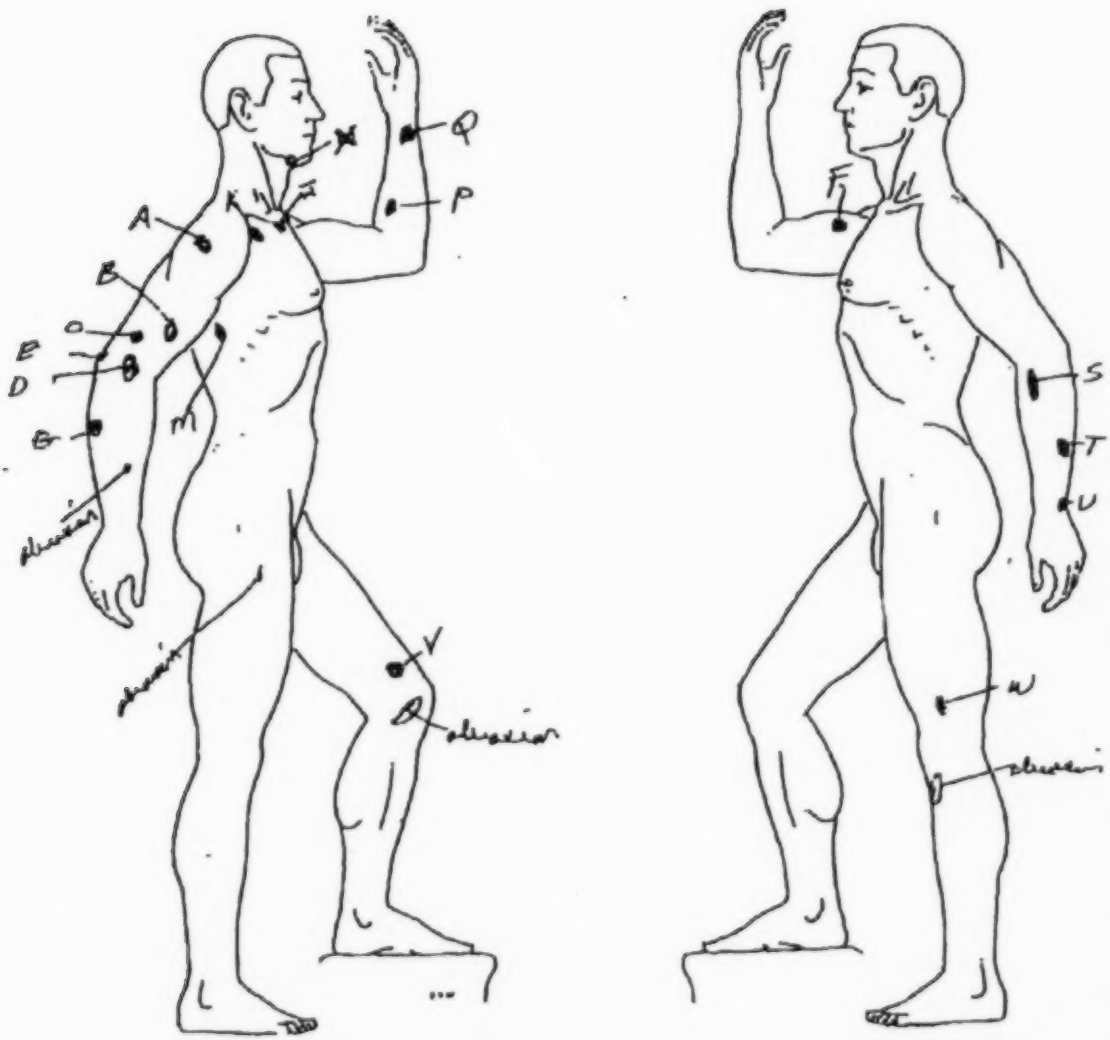
VIEWS OF THE BODY

Clothed. Dark long sleeve shirt. Navy blue jeans. Two brown shoes. Brown belt. Grey boxer briefs. Grey hair. Mustache/goatee.


bullet #2
1" below top of shoulder, midline
64
piece of bullet jacket
small abrasion
bullet #1
GSW R
bullet #3
GSW L
GSW
GSW R
GSW L
GSW V
GSW W
abrasion
abrasion
open wound
GSW
small abrasion
GSW
GSW
GSW

CASE NO. _____ NAME _____

04-2796



X-rays: bullet in ⓒ arm, bullet in ⓢ-ⓣ side of chest, bullet in ⓠ upper-left chest, jacket in ⓡ left chest (#1), jacket in ⓢ upper leg, bullet in ⓤ head multiple pellets in ⓥ lower arm (fragments), bullet frag ⓦ upper arm

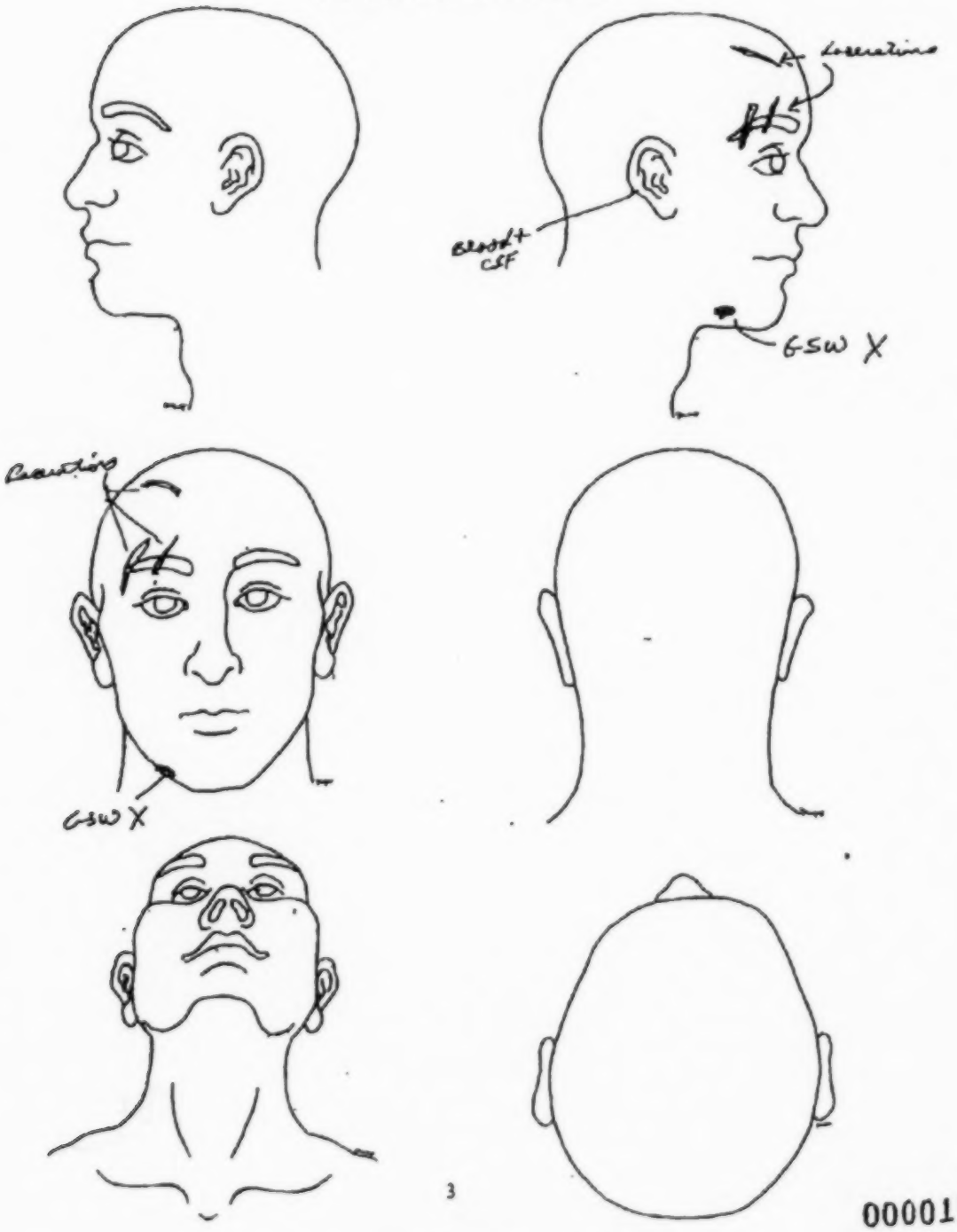
FORM B

000017

T-SHIRT #2

95

VIEWS OF THE HEAD



3

000018

001127

D'AFRAM #4

WOUND CHART

NAME Richards, Donald CASE # _____ DR. _____

WOUND	INCHES ABOVE HEEL	INCHES FROM MIDLINE	LOCATION	DIMENSIONS (INCHES)	PROBE DEPTH (INCHES)	PATH OR DIRECTION	DESCRIPTION AND/OR COMMENTS
A							
B							
C							
D							
E							
F						EXIT OF B	
G							
H							
I							
J	56 1/2	2 3/4" RAML	(R) upper chest				
K	56	7" RAML	(R) upper lateral chest				
L	51	1" LAML	(L) middle chest				
M	49	6 1/4" RAML	(R) lower chest, lateral				
N	46 1/2	2 3/4" RAML	(R) lower chest				
O	47	1/4" LAML	(R) lower chest			EXIT OF N	

DIAGRAM #3 1/2

UNIVERSITY OF TENNESSEE HEALTH SCIENCE CENTER REGIONAL FORENSIC CENTER
AUTOPSY PROTOCOL

NAME: **Donald Rickard** CASE NO **C04-2796**

RACE: **White** SEX **Male** AGE: **44**

MICROSCOPIC SUMMARY

None.

HOMICIDE WITNESS STATEMENT

This is the statement of Joseph Forthman
Age: 31 DOB: [redacted] Sex: M Race: W SSN: [redacted]
Home Address: [redacted] Home Phone: [redacted]
Education: 626 E. Broadway [sic] Occupation: Police Officer
Employed by: West Memphis Police Department
Work Address: 626 E. Broadway Work Phone: 870-735-1210

Next of Kin/emergency: [redacted]
Address: [redacted] Home Phone: [redacted]
Business Address: N/A Work Phone: N/A

This statement is being taken at the **Homicide Office, 201 Poplar, Room 11-21** on July 18, 2004 at 2:45 a.m.

Statement made to: Sgt. N. Berryman & Sgt. Miller

Typed by: Sgt. N. Berryman

This statement is relative to the **shooting** which occurred on Jackson at Thomas on July 18, 2004 and which is filed under **MPD File #** 0407008649.

Q. Are you aware the Memphis Police department is investigating the shooting which involved the West Memphis Arkansas police department this date at Jackson and Thomas?

A. Yes, sir.

Q. Where are you employed and in what capacity?

A. West Memphis Police departement [sic], evening shift Lt. I work 3:00 p.m. to 11:00 p.m. I was working DWI patrol tonight.

Q. What unit # were you driving tonight?

A. Unit 279.

Q. Is that car equipped with a video camera?

A. Yes sir.

Q. Where [sic] you present when the shooting occurred at Jackson and Thomas?

A. Yes, sir.

Q. Did you fire any shots?

A. No, sir.

Q. Do you know who fired shots?

A. At the scene, I saw patrolman Gardner shooting. But after it was over with I found that Sgt. Plumhoff and patrolman Galtelli also had fired shots.

Q. In your own words could you explained [sic] what lead [sic] up to the shooting?

A. I just cleared a traffic stop at Martin Luther King Blvd. & I-40. At approx. 12:10 a.m. I was traveling Southbound on Martin Luther King and observed the suspect vehicle traveling north bound on Martin Luther King near McDonalds, with a headlight out, I turned around and conducted a traffic stop, at the Triple Diamond Shamrock gas station at Southland drive ~~in~~ and the north service road. After exiting my unit, the suspect stuck his head out his drivers side window and yelled back at me, stating something to the fact that man I was on my way to Walmart to fix my headlight. As I was approaching the driver's side door, I also noticed that the windshield on the driver's left bottom side from looking out the windshield from the inside was shattered and pushed in toward the driver in the shape of a human head or basketball. There [sic] fresh glass shaving [sic] on the dash and driver's steering column. I asked the driver for his driver's license and insurance and the driver appeared very nervous, fumbling for his wallet. I noticed he had a passenger which was a white female with nothing but a bra and cut up blue jeans on. I noticed the driver took his wallet out, he was fumbling with the cards inside his wallet and would never take anything out. I asked him where he was coming from and he said from a hotel. I asked him what hotel and he couldn't give me a name. I asked him for a room number and he couldn't give me a room number. I remember looking into the back seat of the car and noticed a lot of items in the back seat. I noticed a case of open beer between the driver's side and passenger side seats to the rear. I think I asked him about the beer and he said he didn't have anything to drink. I asked him

another question and the female answered the question, but I don't recall what the question or answer was. I turned my focus to the windshield in which the driver became more nervous. I don't believe he gave me an answer concerning the windshield. I asked him again for his ID and what his name was and he never did give it to me. At which time, I saw his hand shake even more while he was looking at the female. I took a few steps back from the door and asked him to step out of the car. I believe I asked him twice. At that point, he looked back at me and then looked to the female and drove off at a high rate of speed, almost hitting an eighteen wheeler at Southland drive and the north service road. I then ran back to my car and called in on the radio I had one running. He fled eastbound on Southland drive and turned south on Martin Luther King drive, running the stop sign. As I got onto Martin Luther King drive, I noticed one of my units setting [sic] at the intersection of Martin Luther King driver [sic] and I-40 with his blue lights on. I noticed two of my units on a traffic stop at I-40 westbound on ramp and Martin Luther King, and two more units traveling northbound on Martin Luther King approaching the I-40 eastbound on ramp. The car continued southbound on Martin Luther King and turned eastbound onto I-40. At that point I became the secondary unit and was calling the pursuit, which carried us into Memphis. I know four units were involved in the pursuit in which I ordered the units to start setting up for a rolling road block. Unit 290 which is Sgt. Plumhoff, began attempting to go around the suspect's vehicle where the suspect vehicle them attempted to hit Sgt. Plumhoff's vehicle and

run him off the road. Patrolman Jimmy Evans came by my unit and attempted to go to the left of the suspect's vehicle at which time the suspect attempted the same action as he did to Sgt. Plumhoff. Sgt. Plumhoff and myself told West Memphis dispatch that we had aggravated assault charges on the driver and I notified them to call Memphis dispatch. I asked our dispatch for a return on the tag and she stated it came back to a Saturn. We attempted a rolling road block several more times but the suspect took evasive actions at our units and would not let us get around to set up the rolling road block. The pursuit continued into Memphis at which time, I think he was in the center lane approaching the Danny Thomas exit. The suspect made a sharp right turn almost hitting a civilian's vehicle exiting onto Danny Thomas. He continued northbound on Danny Thomas and then made a right turn onto Jackson, at that point I believe I was the third unit back. As I called that he made the turn onto Jackson his car spun out of control and ended up in the parking lot at the corner facing westbound. I remember a unit in front of my unit facing the suspect's car and units coming up along side the suspect's car. I never got out of my unit, due to the fact I observed the suspect's car ramming the unit in front of mine and backing up afterwards. I looked to the rear of my unit in an attempt to back up, to maneuver my unit around to the rear of the suspect's car. While doing so I then heard loud popping sounds and looked up and to the right and observed patrolman Gardner discharging his weapon in the suspect's direction while the car was still backing up. The suspect's car got back out

onto Jackson facing eastbound and began driving away from the scene eastbound. Due to the fact that I was attempting to come around to the rear of the suspect's car I was able to then retake the lead in the pursuit as we began driving eastbound. We continued eastbound on Jackson. Where he didn't make the turn at Manassas he just kept going straight into the brick wall. I notified my dispatch that we needed a ambulance and gave the location and started giving directions to my officers on the scene on what to do. While doing so I asked who was involved in the shooting and pulled them back to the units.

Q. Describe the suspect's vehicle?

A. Light colored 4door vehicle.

Q. Describe the driver?

A. White male, later 30's early 40's dark hair, I think he had a mustache.

Q. Describe the passenger?

A. White, female, later 30's early 40's appeared dirty, with only a bra and cut up blue jeans; long blonde shoulder length stringy hair.

Q. Were your emergency lights and siren engaged during the pursuit?

A. Yes, sir.

Q. When the suspect's car was stopped at Jackson and Thomas did you hear any voice commands given to the suspect?

A. No, my windows were up and siren was on.

Q. What did you do with the video tape from your dash mount camera?

A. After I got back to the primary scene, I ejected the tape so it would not be damaged or recorded over, by accident. Then after arriving at 201 Poplar I got the tape out of the VCR and gave it to Sgt. Miller and initialed the tape and put my badge number on it.

Q, After the suspect's vehicle crashed did you or any other officer render aid?

A. Yes, sir. I saw other officers rendering aid and I ordered officers to stay with the injured parties until medical personal [sic] arrive.

Q. Is there anything else you could add to your statement that would aid in this investigation?

A. No sir.

Q. I will now asked you to read over your 4 page statement and if it is true and correct initial the right corners of the first three pages and sign, date and time the last. Will you do this?

A. Yes.

/s/ [Illegible]	216	07/18/04 @ 0424
Signature		Date/Time

Witness Statement
Incident # 0407008649ME
Type of Report: DOA/Unknown.
Location: Jackson and Thomas
Date: July 18, 2004 at ~~2:45~~ 12:20 AVJ a.m.

This is the statement of: Lance Ellis
Age: 33
D.O.B: [redacted]
Sex: Male
Race: White
SSN: [redacted]
Home Address: [redacted], West Memphis, AR
Home Phone: [redacted]
Education: Four years of college
Occupation: Police Officer
Employer: West Memphis Police Department
Employer Address: 626 E. Broadway, West Memphis, AR
Work Phone: 870-735-1210

Next of Kin/Emergency Contact: [redacted]
Address: [redacted]
Home Phone: [redacted]
Employer: self-employed
Work Phone: NA

This statement is being taken at the Homicide Office, 201 Poplar, Room 11-21 at my desk on Sunday, July 18, 2004 at 0500 hours.

Statement made to: Sgt. C.V. Justice IBM 9460 Car 1909 and Sgt. M. Berryman IBM 0677 Car 1913

Typed by: Sgt. C.V. Justice IBM 9460 Car 1909

This statement is relative to the DOA/Unknown complaint which occurred at Jackson and Thomas on

Sunday, July 18, 2004 at approximately 0020 hours which is filed under MPD file #0407008649ME

Q: Are you aware that the Memphis Police Department is investigating the shooting which involved the West Memphis Police Department this date at Jackson and Thomas?

A: Yes.

Q: At the time of this incident, were you employed by the West Memphis Police Department and if so, in what capacity?

A: Yes I am, I'm a patrolman.

Q: What unit number were you driving tonight?

A: My car is 284.

Q. What is your call number?

A. 253 . . . that is my badge number and my call number.

Q: Is the car you were driving tonight equipped with a video camera?

A: Yes.

Q: To your knowledge, was the video recording device working properly?

A: Yes.

Q: Did you have a body Microphone on your person as the video tape was recording?

A. Yes.

Q: Were you present when the shooting occurred at Jackson and Thomas?

A: Yes.

Q: Did you fire any shots?

A: No.

Q: Do you know who fired shots? If so, explain.

A: Yes. I saw one officer fire shots and I found out later at the crash scene that two others also fired shots . . . I heard those, but I didn't see them.

Q: In your own words, explain what events led up to the shooting incident.

A: It was about 12:15 a.m. I was just coming back into the city limits . . . I had been out checking underneath the I40 and I55 bridge . . . we've been told to check those nightly because of the terrorist alerts. As I was approaching The Martin Luther King exit, I heard Lt. Forthman making a traffic stop at Southland Drive and Martin Luther King. I advised over the radio that I was direct to back him up. As I turned off the exit ramp onto Martin Luther King Drive to travel north, I observed another West Memphis Police car passing in front of me . . . driving north of Martin Luther King and I followed him. About that time, Lt. Forthman called on the radio that the vehicle he had stopped was

fleeing..travelling south on Martin Luther King. I observed the suspect vehicle and Lt. Forthman's patrol unit in front of my car . . . they were travelling south on Martin Luther King and turned east and got on Interstate 40 eastbound. Lt. Forthman, Sgt. Plumhoff and Patrolman Evans were the first three cars, I was travelling behind them in the pursuit. The pursuit travelled east on I40. As we got to the weigh scales around the Bridgeport exit, I heard the Lt. Advising our dispatch to notify Memphis and instructed our cars if possible to get in front of the suspects to construct a rolling road block. At this time, Patrolman Evans attempted to get in front of the car and I heard over the radio that the suspect tried to ram him and we now had aggravated assault charges. I heard for the second time someone advising to notify Memphis police department and what charges we had on them. The pursuit crossed the I40 bridge into Memphis and continued on the I40 to the Danny Thomas exit. The suspect took that exit, followed the curve around travelling west, came to a red light at the intersection and at this time, the suspect turned right turning north. The pursuit continued north when the suspect turned onto Jackson street. I didn't see this, but the vehicle lost control and spinned around, so when I arrived, I saw the suspect vehicle facing the patrol units. There was one patrol car directly in front of the suspect vehicle and two others were on the sides as

we attempted to block the suspect vehicle in that lot. Patrolman Gardner was directly in front of me and he pulled his patrol car's passenger's side to the left rear of another patrol car ... the one that the suspect vehicle was directly facing. At this time, I exited my patrol vehicle and I heard ~~shtos~~ shots fired. I didn't see which officer fired those shots. As I ran toward the suspect vehicle, I observed the suspect beginning to put his car and reverse and start to back up. The suspect backed up making a u-turn onto Jackson. When he did this, the car was backing towards me and Patrolman Gardner. I stepped to my right side moving out of the vehicle's path and I observed Sgt. Plumhoff was at an angle near the right front fender of the suspect's vehicle and I saw him fire several shots at the suspect through the front windshield. Sgt. Plumhoff was standing in the street or on the edge of the parking lot. After this, the suspect vehicle began travelling forward going east on Jackson. As I was going back to my patrol car, I observed one patrol car following the suspect vehicle. Myself and Patrolman Gardner got back into our cars and followed the suspect's vehicle. Five to ten seconds of continuing, I heard over the radio that the suspect vehicle had wrecked out. As I pulled up to the scene, I observed Patrolman Gardner and Sgt. Plumhoff out of their vehicles and they were running towards the suspect vehicle, I don't know who yelled this, but one of

them called back to me and Lt. Forthman that the scene was secure. . . . I'm not sure who else was behind me. Lt. Forthman advised over the radio our location and that we needed Memphis Police and rescue and advised our dispatch of the accident situation. Lt. Forthman then asked all of the officers present who had fired their weapons and he took them aside. I advised him that I had not fired my weapon and he advised me to stand by the suspect vehicle and to secure the scene. I did that until Memphis officers and paramedics arrived.

Q: Describe the suspect vehicle.

A: It's was a white four door compact styled car like a Honda Accord or a Nissan Sentra.

Q: Describe the driver.

A: I saw the driver when the paramedics began working on him . . . he was a white male . . . salt and pepper hair . . . gray and black in his hair.

Q: Describe the passenger.

A: The passenger was a white female, it looked like she had on a white bra . . . a white halter top type shirt. . . . that's all I saw on her.

Q: Were your emergency lights and siren activated during the pursuit?

A: Yes.

Q: Does the video camera begin to activate when your emergency equipment is turned on?

A: The video comes on with the lights, however the audio . . . the body mic, has to be turned on manually.

Q: At what point did you turn on the body mic?

A: After I activated my lights and siren, I activated my body mic for audio . . . as I got on Interstate 40 in the pursuit.

Q: When the suspect's vehicle was stopped at Thomas and Jackson, did you hear any voice commands that were given to the suspect?

A: No, but I was three cars back and my siren was still activated . . . I couldn't hear over my patrol car's siren.

Q: What did you do with the video tape from your patrol car's dash mount?

A: Before leaving the crash scene, Inspector West pulled the tape from the lock box in the trunk of my patrol car and gave the tape to Sgt. Miller.

Q: After the suspect's vehicle crashed, did you or any other officer render aid?

A: I did not and I'm not sure who it was but, one officer checked the pulse on both suspects and advised that they had a weak pulse . . . they

had already called for rescue and Memphis Police.

Q: How many shots were fired?

A: I'm not sure, I heard several.

Q: Describe the location that the suspect vehicle came to rest.

A: The vehicle came to rest on the northeast of an intersection on a houses front porch. The vehicle was half on and half off of the porch.

Q: Is there anything else you would like to add to this statement that would aid us with this investigation?

A: No . . . not anything I know of.

Q: Was this statement given freely and voluntarily, without any threats or promises?

A: Yes.

Q: Can you read and write without the aid of eyeglasses?

A: I have to have my eyeglasses.

Q: I will now ask you to read this statement and if you find it to be true and correct, initial the bottom of each page except the last, sign the last page. Do you understand?

A: Yes.

Name: /s/ [Illegible] Lance Ellis **Date/Time:** 07-18-04 6:20 AM

Witness: _____

Witness: _____

_____

Witness Statement
R&I # 0407008649
Date: Sunday, July 18, 2004

This is the statement of: James Anderson Pearce
Age: 23 Sex: Male Race: White
DOB: [redacted] **SSN:** [redacted]
Home Address: [redacted]

Home Phone: [redacted]
Education: BA-Professional Services (college)
Occupation: Self-employed (Pearce Window Cleaning)
Work Phone: [redacted]

Next of Kin/Emergency: [redacted]
Address: [redacted]

Home Phone: [redacted]

This statement is being taken at the Felony Response Office, 201 Poplar, Room 11-01 on Saturday, July 18, 2004, at 0248 hrs.

Statement made to: Sgt. W. D. Cleveland #1619, Car 1615

Typed by: Sgt. W. D. Cleveland #1619, Car 1615

This statement is relative to the complaint of Homicide, which occurred at Jackson and Thomas, which is filed under MPD File # 0407008649.

Q: Did you witness a shooting this morning?

A: Yes.

Q: Who was involved in the shooting?

A: Officer Plumhoff, he's a sergeant. I know there were other people involved, but I didn't know who they were until later on.

Q: Was this a police related shooting?

A: Yes.

Q: What was your role in the shooting?

A: I was just an observer, I was in the vehicle.

Q: With whom were you riding?

A: Officer Plumhoff.

Q: Are you a police officer?

A: No.

Q: Were you a civilian ride-a-long?

A: Yes.

Q: What day did this incident occur?

A: July 18th, 2004.

Q: Who was present when this incident occurred?

A: Myself Officer Plumhoff, Officer Gardner, Officer Ellis and several other West Memphis officers, I don't know their names, and the two suspects.

Q: Tell me in you own words what you observed.

A: Myself and Officer Plumhoff were in West Memphis on Martin Luther King Blvd. We saw the suspect's vehicle come by and another officer pursuing. We made a U-turn and joined the pursuit as the lead vehicle. We continued the pursuit onto Interstate 40 East. One time as we were going towards the bridge the suspect swerved and almost hit our vehicle.

Q: Did the swerve towards you seem intentional?

A: Yes.

Q: Continue please.

A: Soon after that another officer got in front of us and got close to the suspect vehicle. The suspect appeared to swerve towards that officer as well. After crossing the bridge we exited onto Danny Thomas going north and then turned right onto Jackson. The lead vehicle at the time made contact with the suspect vehicle, I don't know if it was intentional or not. The

suspect vehicle spun around 180 degrees into a parking lot. Then Officer Plumhoff hit the suspect's vehicle. I don't know if we were moving and he was stopped or we were stopped and he was moving. Officer Plumhoff and other officers got out of their vehicles at this point and the suspect threw his vehicle into reverse. The suspect vehicle was inside a perimeter of several patrol cars and could not get out and there were also several officers standing in between the suspect vehicle and the patrol cars. The suspect continued to drive forward and backward inside the perimeter. At this point Officer Plumhoff fired three shots towards the driver through the windshield. The suspect continued to go back and forth inside the perimeter and several more shots were fired, but I couldn't tell who fired or where they came from. The suspect finally broke away from the patrol cars and turned east on Jackson. Officer Plumhoff got back into his vehicle as did other officers and continued the pursuit. By the time we reached the suspect's vehicle it had already crashed into a house.

Q: Could you ever see the suspects?

A: Yes.

Q: What were the race and sex of the suspects?

A: The driver was male white and the passenger was female white.

Q: Did you ever see either suspect armed with a weapon?

A: No.

Q: Describe the suspect's vehicle?

A: It was a small white vehicle, I'm not sure what type maybe Honda or a Toyota. It was small and white that's all I know about it. I do remember one thing, the fact that it had a Georgia tag.

Q: Did you hear any of the officers giving the suspects voice commands?

A: I heard yelling, but I couldn't understand them because I was inside the vehicle.

Q: What was Officer Plumhoff's position when he fired the shots?

A: He was in front of the suspect's vehicle towards the right side of the suspect's vehicle, in front of the passenger's side. From where he was standing he fired across the front of the vehicle into the driver's side of the windshield.

Q: Is everything that you have said in this statement the truth?

A: Yes.

Q: Can you read and write without the aid of eyeglasses?

A Yes.

Q: I will now ask you to read this statement and if you find it to be true and correct I will ask you to initial each page except the last page. Sign the last page. Do you understand?

A: Yes.

/s/ [Illegible]	07-18-04 4:19 AM
Signature	**Date/Time**
/s/ [Illegible]	07/18/04 0419 HRS
Witness	**Date/Time**
Witness	**Date/Time**

HOMICIDE WITNESS STATEMENT

This is the statement of Jimmy Evans
Age: 29 DOB: [redacted] Sex: M Race: W SSN: [redacted]
Home Address: [redacted] Home Phone: [redacted]

Occupation: Police Officer Employed by: West Memphis Police Department
Work Address: 626 E. Broadway Work Phone: 870-735-1210

Next of Kin/emergency: [redacted]
Address: [redacted] Home Phone: [redacted]
Business Address: N/A Work Phone: N/A

This statement is being taken at the **Homicide Office, 201 Poplar, Room 11-21** on July 18, 2004 at 4:33 a.m.

Statement made to: Sgt. N. Berryman & Sgt. Miller
Typed by: Sgt M. Miller

This statement is relative to the **shooting** which occurred on Jackson at Thomas on July 18, 2004 and which is filed under **MPD File #** 0407008649

Q. Are you aware the Memphis Police department is investigating the shooting which involved the West Memphis Arkansas police department this date at Jackson and Thomas?

A. Yes, I am.

Q. Where are you employed and in what capacity?

A. I am employed by the West Memphis Police Department, as a patrolman.

Q. What unit # were you driving tonight?

A. I was driving unit #205

Q. Is that car equipped with a video camera?

A. It has an inoperable camera.

Q. Where you present when the shooting occurred at Jackson and Thomas?

A. Yes, I was.

Q. Did you fire any shots?

A. No.

Q. Do you know who fired shots?

A. I heard the shots being fired but I didn't see who was firing. I seen two officers with their guns

drawn. That was Sgt. Plumhoff and Officer Gardner.

Q. In your own words could you explained [sic] what lead [sic] up to the shooting?

A. I heard an officer say on the radio that there was a vehicle running. I was traveling northbound on Martin Luther King, when I noticed two squad cars traveling southbound coming towards me. At that time I noticed a white vehicle make a turn onto the on ramp of I-40. The two squad cars were following, I started following and was the third car in the pursuit. I heard Lt. Fortham [sic] state on the radio let's try to end the pursuit. At that time myself and another unit were trying to get around him to box him in. We got separated by an eighteen wheeler, and when we got back together in front of the truck I took primary in the pursuit. The suspect went to the far-left lane and I attempted to go around him on the right, as I attempted to go around he swerved his vehicle attempting to strike my patrol unit. In an attempt to keep him from striking my patrol unit I almost lost control. We continued on to the bridge, and as we crossed the bridge I attempted to pass him again on the right. Again he turned his vehicle as if to hit mine. At that time we were coming up on traffic, I fell in behind the vehicle. We took the Danny Thomas exit, when we got on Danny Thomas we went northbound. As we were coming up on Jackson the suspect he went wide like he was going to get in the center lane then he made a right hand turn I tried to cut to the inside of the turn in another attempt to get in front of him. At that time he locked the car up, and I

applied my brakes, and started skidding, the left front of my vehicle skidded into the right rear of the suspect's vehicle. He spun out into the parking lot at the corner of Jackson and Danny Thomas. I exited my vehicle, and attempted to make contact with the passenger or the driver. The driver of the vehicle, the suspect, began moving forward in an attempt to flee again. I had my service weapon in my hand, the car moved forward striking my right hand, I struck the upper right corner of the windshield, attempting to shatter the windshield. I reholstered my weapon, and attempted to retrieve my baton out of the holster. As I turned my back I heard several shots being fired. I turned around as to duck, and when I turned back around I saw Sgt. Plumhoff with his weapon drawn. The suspect began backing out as I was attempting to get to the passenger's door to open it. At that time I heard several more shots being fired. After those shots were fired, the suspect vehicle backed on out into the street. I turned to run to my squad car and as I am running to my car I hear several more shots being fired. At that time they took off traveling east on Jackson, I notified dispatch that I was no longer in the pursuit. I heard someone on the radio say that they had one out on foot, I think it was Lt. Forthman, I got in my car and went down to the scene where the car was wrecked out on a porch on Jackson. Lt. Fortham [sic] advised me to go back down and secure the crime scene where the shooting happened.

Q: Describe the suspect's vehicle?

A: A small white compact car.

Q: Describe the driver?

A: I can't, a male, white with salt and pepper hair was all that I saw.

Q: Describe the passenger?

A: Female, white with blonde hair and a white top.

Q: Do you know what the charges were on the suspect's [sic] when the pursuit started?

A: No, I do not know what the initial charges were.

Q: Were you injured during this incident?

A: Just a small scratch on my right hand where the suspect's car him me.

Q: Did you see the suspect's vehicle hit or attempt to hit anyone other than yourself?

A: No I was to [sic] busy trying to get into the vehicle. As I approached the vehicle on the passenger side I kept my eyes on the driver. He came past me I could hear him ram another car, but I concentrated on his hands.

Q: Where was your vehicle parked in relation to the suspect's vehicle?

A: My right front was to his right front.

Q: Did you or any other officer's give verbal commands to the suspects when they stopped at Jackson and Danny Thomas?

A: Yes, I gave the command to stop the car and exit the vehicle, it probably wasn't those exact words. I could hear another officer yelling to get out of the car but I don't know who it was.

Q. Is there anything else you could add to your statement that would aid in this investigation?

Not that I can think of . . .

Q. I will now asked [sic] you to read over your 3 page statement and if it is true and correct initial the right corners of the first three pages and sign, date and time the last. Will you do this?

A. Yes.

/s/	Jimmy Evans	07/18/04
	Signature	Date/Time

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, by and through her mother SAMANTHA RICKARD as Parent and Next Friend,

Plaintiff,

No. 05-2585DV

vs.

CITY OF WEST MEMPHIS, ARKANSAS, OFFICER VANCE PLUMOFF [sic], Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER TONY [sic] GALTELLI, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JOHN GARDNER, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER LANCE ELLIS, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JIMMY

EVANS, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JOSEPH FORTHAM [sic], Individually and in his official capacity as an officer of the West Memphis Police Department, and CHIEF ROBERT PAUDERT, Individually and in his official capacity as Chief of the West Memphis Police Department,

Defendants.

DEPOSITION OF JOSEPH FORTHAM [sic]
August 4, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ESTATE OF KELLY A. ALLEN, Deceased, CLAYTON DAVID ALLEN, MARIA NICOLE ALLEN, A Minor by Next Friend, Kenneth B. Allen, ALEXIS LANE ALLEN, A Minor by Next Friend, Kenneth B. Allen

Plaintiffs,

No. 05-2489MaV

vs.

CITY OF WEST MEMPHIS, MAYOR WILLIAM H. JOHNSON, CITY OF WEST MEMPHIS POLICE DEPARTMENT, ROBERT PAUDERT, in His Personal and Official Capacity as Chief of the West Memphis Police Department, OFFICER VANCE PLUMHOFF, in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER JOHN BRYAN GARDNER, in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER TONY [sic] GALTELLI, in his personal and official capacity as a police officer of the West Memphis Police Department, and ANY OTHER UNNAMED OFFICERS OF THE WEST MEMPHIS POLICE DEPARTMENT, in their personal and official capacities,

Defendants.

DEPOSITION OF JOSEPH FORTHAM [sic]
August 4, 2009

* * *

[10] Q. This is a deposition. It is not a marathon. So – and I have no idea how long this is going to take; but however long it does take, if during the

course of the deposition you need a break, you just tell us, we'll take a break.

A. Yes.

Q. Okay? The – you know the event that we're here to talk about?

A. Yes, sir.

Q. Do you recall what day that occurred?

A. Yes, sir.

Q. What day was that?

A. July 18th of 2004.

Q. What day of the week was that?

A. Sunday morning.

Q. Just after midnight?

A. Yes, sir.

Q. What was your shift?

A. I was actually on STEP Program.

Q. What's that?

A. That's a program that is financed through the State of Arkansas for DWI enforcement.

Q. What was the period of your shift for that evening?

* * *

[18] if you moved to the back?

A. Say again? I'm sorry.

Q. Had you moved to the back, was there another car still there that would have been blocking him from the right side, the passenger side?

A. Passenger side there was a car to my left. So I would think that car would have been blocking him from that side.

Q. And whose car was that?

A. I don't know.

Q. Now, I'm going to back up; and we're going to come through all of these events while we're here, but I want to go back to how this all started.

Now, you were in the area of Martin Luther King Boulevard and Southland Drive?

A. Yes, sir.

Q. Is that where you first saw his vehicle?

A. No, sir.

Q. Where did you first see his vehicle?

A. Martin Luther King near Petro Road.

Q. How far way from that – how far from where you stopped him was that?

A. Talking about city blocks, you're talking about three to four city blocks.

[19] Q. Okay. And what did you observe about his car that led you to pull him over?

A. Driver side headlight was not functioning.

Q. Is that all?

A. Yes, sir.

Q. Okay. And did you then get behind him and turn on your lights?

A. Yes, sir.

Q. Did he pull over?

A. Yes, sir.

Q. Anything untoward about the events up to then?

A. No, sir.

Q. In other words, he – he pulled over as you would have expected him to once you indicated with the lights that you wanted him to pull over?

A. Yes, sir.

Q. Now, was your video working?

A. Yes, sir.

Q. How is that activated?

A. Through the blue lights or through the – manually me turning it on.

Q. In this event which turned it on?

A. Blue lights.

* * *

[23] A. Yes, sir.

Q. If he had a headlight out, is that a ticketing offense, if I can use that term?

A. Sure, it's a ticketing offense.

Q. Was it your intent to issue a citation to him for having no headlight?

A. No, sir.

Q. Okay. You were going to talk to him about it and let him go?

A. If that's all that was of it, yes, sir.

Q. Well, that's all you knew about at that point?

A. At that time, yes, sir.

Q. I mean, you didn't have any reason to think anything else was wrong?

A. That's correct.

MR. MOSLEY: I'm sorry. What time are you asking about?

MR. SMITH: When he goes up and talks to him.

MR. MOSLEY: Okay.

BY MR. SMITH:

Q. Now, when you approached, did you approach from the driver's side?

[24] A. Yes, sir.

Q. And having looked at your video, is the – is there audio as well?

A. Yes, sir.

Q. And does – do you have a mike on then?

A. Yes, sir.

Q. Did you have a mike on?

A. Yes, sir.

Q. And did the mike pick up the conversation between the two of you?

A. To an extent, yes, sir.

Q. Okay. Does it pick you up?

A. Yes, sir.

Q. Are there times where you can't hear on the mike what he's saying or through the mike what he's saying?

A. Looking at – after researching – looking at my video?

Q. Yes, sir.

A. It's mumbled. I mean, yes, it's mumbled to me.

Q. It doesn't come over clear?

A. To me. It's – without turning it up or something like that, it's –

[25] Q. (Interposing.) Okay.

A. Yes.

Q. So when you approached him, what did you do? What did you say?

A. I asked him for his driver's license.

Q. Let me stop you first.

A. Okay.

Q. When you approached him, you approached him from the driver's side. Did he roll down his window, or did he get out?

A. Rolled down his window.

Q. Okay. Nothing wrong with that, correct?

A. That's correct.

Q. And you were about to tell me you asked him for his driver's license and probably the other registration and insurance information?

A. I believe so, yes, sir.

Q. And what did he do?

A. When I first got out of my vehicle, before even talking to him, he started talking back towards me, telling me that he knew he had a headlight out, that he was going to Wal-Mart to get it fixed; and that's when I made contact with him up to the side of his car and asked for his driver's license.

[26] Q. Okay. There was nothing about his driving that was wrong, he just had a headlight out?

A. That's correct.

Q. So when he said as you were approaching him, Off – essentially, Officer, I know I've got a headlight out, I'm going to get it fixed, that didn't come as any particular surprise to you? I mean, that didn't sound unusual to you, he knows he's been stopped because his headlight is out?

A. It's usually unusual for somebody to already start talking to me before I even get out of my car. That's the only unusual thing about it; but as far as somebody knowing that they have a headlight, that's not unusual.

Q. I mean, he hadn't been speeding, he hadn't been weaving or anything like that? As far as he would have been concerned reasonably, the only thing he's done wrong is drive with a headlight out?

MR. MOSLEY: Object to the form of the question.

BY MR. SMITH:

Q. Agree? You can answer.

A. Agree.

Q. Okay. So when you came up and asked for [27] the information, now what is said?

A. When I walked up, I noticed that there is a big imprint, the glass was broken and pushed in to the form of probably about so far (indicating) on – right at the driver's left windshield in the form of a head or a basketball form. I noticed when I walked up that there was still glass shavings on top of his dash, and I asked him about his – the windshield, what was wrong with his windshield.

Q. What did he say?

A. He didn't say anything. It was like a shock. He – uh-uh type of response; and the female passenger answered the question for him.

Q. And what did she say?

A. She said that they hit a curb and had broke the windshield.

Q. What was said next?

A. I asked him where they were coming from. He said he was coming from a hotel. He couldn't tell me which hotel he was coming from. I noticed that he had his wallet in his hand, just like this (indicating), and that he was thumbing through his wallet; and I

noticed he passed over his driver's license or an I.D. card, a Tennessee I.D. card type [28] several times.

I asked him about the beer that I saw in between the passenger and driver's seat, Keystone beer, asked him if he had anything to drink. He said no. I noticed that he was real nervous, and I just noticed that his hands were shaking, he kept passing over his driver's license or I.D. card. I never did get to see if it was a driver's license or I.D. card. I just noticed he had one in his wallet.

Q. So when he was talking to you, was his speech clear?

A. I don't remember.

Q. Did you smell alcohol on him?

A. I didn't smell alcohol standing outside the car, no, sir.

Q. At that point you have asked him about the windshield, you've asked for the – presumably the license, registration, and insurance information, all three?

A. I can remember asking him for his driver's license.

Q. Okay. And he clearly was looking for those?

A. He was –

[29] Q. (Interposing.) I mean, that's what you thought he was doing?

A. I thought he was trying to look for it through his wallet.

Q. Okay. Was anything else said? I mean, you've told us that you asked where they'd been, and he said at a motel that he couldn't name. So that's three things now that's been said. Was there any other conversation before he pulled away from you?

MR. MOSLEY: Object to the form of the question.

Go ahead and answer.

THE WITNESS: I asked him to exit the vehicle.

BY MR. SMITH:

Q. And why did you ask him to exit the vehicle?

A. Because he was so nervous and he went over his I.D. card or driver's license several times without producing it to me. At that time I asked him to exit the vehicle.

Q. Why did you ask him to exit the vehicle?

A. Because he was – I felt that he was relying more on her to answer questions, and I wanted [30] to separate him from her so I could talk to him and get him outside so I could actually get his driver's license and hopefully calm him down, because I noticed he was real nervous.

Q. Now, that wasn't the first person you ever saw being nervous after having been pulled over, was it?

A. I'm still nervous when I get pulled over, so yes.

Q. That's not unusual, is it?

A. No, it's not unusual.

Q. Okay. Now, what had she answered for him other than about the windshield?

A. That's about it.

Q. Okay. Now, at that point your thought process was I'm going to question him some more, but I want to do it separate from her?

A. Yes, sir.

Q. What other questioning were you intending to do?

A. Get his driver's license out so he could – at least get his driver's license so I could identify him and investigate the part of the beer that I saw in the back, because if I can get him out, get [31] him closer to me, I can at least smell his breath, look at his eyes, check his – how he stands.

Like I said, I was working DWI, so I was investigating possibly a DWI with a drug – the alcohol that I saw in the back between the passenger and driver seat.

Q. When you say it was between the passenger and driver seat, was it in the back seat?

A. No, sir.

Q. Where was it?

A. Right here (indicating), just if – like on the hump. It was sitting right on the hump, not in the back seat, because the back seat was filled with an assortment of items in the back seat.

Q. Was the beer can that you saw open or not?

A. I didn't see a beer can. I just saw the case of beer.

Q. Oh. A case?

A. Appeared to be a case of beer.

Q. A case being twenty-four cans?

A. I have no clue. If I would have got that far, I could tell you; but I didn't get that far.

Q. It was a box?

A. It was a box.

* * *

[33] Q. Okay. And could you – even though he was inside, where did you have the flashlight pointed?

A. I believe I just had it in my hand.

Q. Was it on?

A. I don't remember if it was on or not.

Q. Okay. You think that will show on the video?

A. I hope so.

Q. Okay. If it was on, routinely would you have had it pointing at the person you were talking to?

A. What part of the person?

Q. The face.

A. Normally no, no, sir.

Q. Where would you normally point it?

A. Hands.

Q. Why?

A. Because hands kill you, face don't.

Q. When you were observing him in this case, his hands – I believe you said both hands were occupied thumbing through the wallet?

A. That's correct.

Q. Did he at any time that you were there do anything that led you to believe that he was a danger to you?

[34] A. No, sir.

Q. When you say that routinely you would point the flashlight at a person's hands because hands kill you and faces don't, that's just part of normal procedure, part of being cautious?

A. Yes, sir.

Q. Okay. The – well, he – when you're talking to him, how is he dressed by your observation?

A. And your definition of – are you looking if he was dirty, clean, if he had –

Q. (Interposing.) Yes.

A. He was just dressed like normal I guess.

Q. Casual?

A. Casual, sure.

Q. Well-kempt?

A. You're well-kempt, kept.

Q. You're well kept.

A. Well, thank you very much. He would be just like anybody walking around outside who lives in this area with a T shirt on I believe and blue jeans.

Q. There was nothing unusual about his dress?

A. No, not at all.

Q. How about her?

A. She had a white halter top on, bra type

* * *

[46] Q. Were you either the supervising or the primary officer in that pursuit?

A. I was the primary for a brief moment in that pursuit, but I was the ranking officer in that pursuit at that time.

Q. Who was the primary officer in that pursuit?

A. I was primary at first, then I believe Sergeant Plumoff [sic] became primary.

Q. Why?

A. Because he got in front of my vehicle when he turned on to 240 from MLK.

Q. Is that what dictates primary?

A. Yes.

Q. Who is closest?

A. First car is primary, second car is secondary.

Q. Who was the supervisor?

A. Supervisor on duty was Sergeant – or, Lieutenant Dana Dykes.

Q. Did either of them ever give instructions to terminate the pursuit?

A. No, sir.

Q. Now, I've noted four things that you said

* * *

[62] Q. Was there any reason why you did not advise the other officers that this was a traffic stop about a headlight and windshield?

A. Any reason why I did not advise them of the charges?

Q. Yes, sir.

A. That night that would be reasons of handling the pursuit, would be supervising the pursuit. I knew what the charges were, but just to come – come over the radio and tell them what the charges were, I did not do that.

Q. Well, you've got at least two other people who can terminate that pursuit that were involved, Officer Dykes and Officer Plumoff [sic], correct?

A. There would actually be three other people that could do that.

Q. Who was the third one?

A. Inspector Eddie West.

Q. And where was Inspector West?

A. I have no clue where he was at the time of the pursuit.

Q. Was he in communication?

A. No, sir. After the pursuit was over with, he was communicating with me.

* * *

[65] closest?

A. You talking about the time Officer Evans asked?

Q. Well, you tell me.

A. At the time Officer Evans asked, no, Sergeant Plumoff [sic] was not primary.

Q. Who was primary?

A. He was in front of me, so – and there was a couple of cars in front of that. I know he wasn't primary at that time.

Q. So as long as – if he was not primary at that time, did he have the authority to terminate?

A. Being a sergeant, yes, sir.

Q. And he gave instructions not to terminate?

A. That's correct.

Q. And he gave those instructions without knowing what the offense was?

A. At that time he knew what the offense was. We had aggravated assault charges on him.

Q. And is that something that happened at the initial stop, or is that something that you say happened later?

A. Happened on the Arkansas side.

Q. Okay.

* * *

[74] Q. (Interposing.) Who did –

A. (Interposing.) Go ahead. I'm sorry.

Q. Who did you ask?

A. Dispatch.

Q. What did Dispatch tell you?

A. They didn't.

Q. No response?

A. No response.

Q. Did Memphis or Shelby County assist you in – once the pursuit came in to Tennessee?

A. At the end of it.

Q. At the end meaning what?

A. When the crash happened.

Q. After the shooting?

A. Yes, sir.

Q. But while the pursuit is still taking place, you never got assistance from Memphis or Shelby County, did you?

A. That's correct.

Q. How long would you estimate that the pursuit had been taking place up to the point where somebody says felony, assault?

A. Minute or two, minute maybe.

Q. So you've gone from Southland and MLK to

* * *

[76] THE WITNESS: If time allotted I should advise – if time allotted, if I can advise, I can advise.

BY MR. SMITH:

Q. I don't understand what you mean if time allotted.

A. If I have enough time during the pursuit that I should – I should advise. That would be the wise thing – a good thing to do, is to give the charges, stuff like that.

Q. Well, you had however long it was from MLK and Southland at least to the weigh station to communicate that; did you not?

A. Given everything that was going on through the pursuit, I don't know if I can say yes or no to that.

Q. Well, let me break it down into two parts for you.

A. Okay.

Q. The opportunity was there – I'm going to get to what you were doing in that time frame in the second part of this question, so let's leave that out of it. But you had the time frame theoretically available, however long it was from MLK and Southland

* * *

[94] A. Yes, sir.

MR. SMITH: Go ahead and cue it, Rob.

This is the unit 279 video.

THE VIDEOGRAPHER: Excuse, Mr. Smith, do you mind if we just go off the record a minute?

MR. SMITH: Okay.

(Off the record discussion.)

THE VIDEOGRAPHER: We're back on the record at 11:47.

BY MR. SMITH:

Q. All right. We've cued the video; and as I indicated to you, were going to go through it now without a particular way of doing it. We'll play it all the way through, but probably we'll stop from time to time.

Do you believe this is the initiation of the events where you put on your lights to pull him over?

A. Yes, sir.

Q. And it's videoing, because you've already got your lights on?

A. Yes, sir.

[95] Q. Now, you've already told us that he pulls over appropriately, and we're about to see that. And that's the sequence we're going to see first, correct?

A. Yes, sir.

Q. All right.

MR. SMITH: Go ahead and roll it, Rob.

(Video playing.)

BY MR. SMITH:

Q. Now, that's the Rickard vehicle just in front of you there, correct?

A. Yes, sir.

MR. SMITH: All right. Stop it. Stop it right there.

(Video stopped and frozen.)

BY MR. SMITH:

Q. Now, granted, with it being on pause, the picture is a little bit fuzzy. But is that a Tennessee license plate?

A. No, sir.

Q. What state is it?

A. Georgia.

Q. Okay. Did you call in those plates that night?

* * *

[98] MR. SMITH: Now, stop it again.

(Video stopped.)

BY MR. SMITH:

Q. You had told us earlier that as you approached him, before you said anything, he had said I know my headlight is out or something to that effect.

A. Yes, sir.

Q. Do you see or hear that on the tape?

A. Yes, sir.

MR. SMITH: Okay. Let's back up and catch that, Rob.

(Video playing.)

BY MR. SMITH:

Q. What does that mean?

A. That's the store.

Q. That was it?

A. Yes, sir.

Q. Who is that car?

A. Sergeant Plumoff [sic] I believe.

Q. Are you the second car at that point?

A. Yes, sir.

Q. Who is that that just went by you?

A. Officer Jimmy Evans.

Q. Are you saying that because of the heavy [99] traffic?

A. Yes, sir.

Q. Do you know what the speeds are at that point?

A. No, sir.

MR. SMITH: All right. Stop.

(Video stopped.)

BY MR. SMITH:

Q. Now, you just said – was that you talking on the mike?

A. There is two of us that was talking, one that said he just tried to ram me and I was talking.

Q. That's what I was referencing, was what came after that. When it was said he just tried to ram another car, we've now got aggravated assault, was that you?

A. Yes, sir.

Q. What did you mean he just tried to ram another car?

A. Well, first one was the one over in front that I took it, and then the second one he went over in front of – towards Jimmy Evans' car.

Q. I don't know that I've heard one – is this in or around the weigh station?

[100] A. Yes, sir.

Q. So are you telling me, then, that there were three aggravated assaults?

A. No, two at that point in time.

Q. Right then there is just two?

A. Yes, sir.

Q. But yet there is another one down the road?

A. I believe so, yes, sir.

Q. I hadn't heard about there being two at the weigh station. I know you told me earlier about you heard one call, but you didn't see it?

A. Yes, sir.

Q. Didn't physically see it?

A. Yes, sir.

Q. But are you telling me you saw one too?

A. Yes, sir, the second one.

Q. The second one at the weigh station?

A. Yes, sir, right there.

MR. SMITH: All right. Let's back it up and see that again.

(Video playing.)

BY MR. SMITH:

Q. All right. Is that far enough?

* * *

[102] THE WITNESS: He just happened to be going from one lane to another when he used his

vehicle intentionally to keep – or, to even run Officer Evans off the road to keep him from going past him.

BY MR. SMITH:

Q. Did he run Officer Evans off the road?

A. Thank goodness he didn't, no, sir.

Q. Did Officer Evans have to take any evasive action?

A. As you see in there, he had to move his vehicle to the left and probably slow down, if I'm looking at it right.

MR. SMITH: Let's back up and take a look at that.

(Video playing.)

THE WITNESS: Had to go to the left.

MR. SMITH: All right. Back it up. Stop it and back it up.

(Video stopped.)

MR. SMITH: I want to go through that in slow-mo.

THE VIDEOGRAPHER: This one we

* * *

[117] MR. SMITH: Now, stop it right there.

(Video stopped.)

MR. SMITH: Pull it back. I want you to stop it, if you can, before the Rickard vehicle backs up.

(Video playing.)

MR. SMITH: Now, right there.

(Video stopped.)

BY MR. SMITH:

Q. Okay. Now, that's at 11:14 and 18 seconds on your clock, correct?

A. Yes, sir.

Q. Now, whose vehicle is to your left?

A. Officer Jimmy Evans.

Q. And is Officer Plumoff's [sic] vehicle to your right?

A. Yes, sir.

Q. Now, is that store one that sits sort of between the convergence of Jackson and Parkway?

A. Yes, sir.

Q. When the Rickard vehicle wrecked out, as was called on the tape, did it hit that building?

A. No, sir.

[118] Q. Do you know that?

A. Yes, sir.

Q. How do you know that?

A. Because I never saw it hit the building.

Q. Okay. Now, at that point can he move forward and get out of that parking lot?

A. No, sir.

Q. Is his only avenue of escape now to back up?

A. Yes, sir.

Q. Now, we're going to start the tape again; and we may run this sequence through several times, but what I want to know right now is when you made the decision that you needed to block the rear egress point, I want you to stop the tape, okay?

A. Okay.

MR. SMITH: All right. Play it, Rob.

(Video playing.)

THE WITNESS: Stop.

(Video stopped.)

BY MR. SMITH:

Q. At that point we see somebody getting out of the car to your right. Again, that is – is that [119] Officer Plumoff [sic]?

A. Sergeant Plumoff [sic], yes.

Q. And the Rickard vehicle is in the process of backing up, correct?

A. Yes, sir.

Q. And there is nobody back there?

A. That's correct.

Q. All right.

MR. SMITH: Rob, start it again; but I want you to be prepared to stop real quick.

(Video playing.)

MR. SMITH: Now. Stop, stop.

(Video stopped.)

BY MR. SMITH:

Q. Whose police vehicle just came into the scene?

A. Officer Gardner's.

Q. That's at 11:14:21 seconds where we're stopped now? Yes?

A. Yes, sir.

Q. Now, is that Officer Evans that went up and used his gun to hit on the windshield?

A. Is that his gun?

[120] Q. Is that who – is that who that was?

A. That's Officer Evans, yes, sir.

Q. Okay. Now, at that point with the vehicle trying to back up and get out, how many officers have their guns pulled?

A. Are you asking me for the experience what I saw that night or what I see on the video?

Q. Either way.

A. On the video I don't see any guns right now.

Q. Okay. Okay. Well, let's back it up, and I want you to concentrate first on Evans.

A. Okay.

(Video playing.)

MR. SMITH: Stop.

(Video stopped.)

BY MR. SMITH:

Q. Do you see –

A. (Interposing.) I see his gun.

Q. All right. Now, did you also see that – Officer Plumoff [sic] I think you saw from an earlier frame was starting to pull his and now has it pulled, or do you need me –

A. (Interposing.) Rewind, please.

[121] MR. SMITH: All right. Rewind it again.

(Video playing.)

THE WITNESS: Yes, sir. He has his weapon pulled.

(Video stopped and frozen.)

BY MR. SMITH:

Q. Okay. And so at least at this point we've got two officers with their weapons pulled with the vehicle trying to escape to the rear at 11:14:21 P is where we're stopped, correct?

A. Yes, sir.

MR. SMITH: Now, I want you to roll it just very quickly, Rob, and we're going to see is it Officer –

BY MR. SMITH:

Q. Did you say Gardner to the right?

A. This vehicle here, sir (indicating)?

Q. Yes, sir.

A. Yes, sir.

Q. Let me before we roll it ask you – I know you distinguished earlier between what you see in the video or what you recall from that night. Did Officer Gardner also pull his service weapon?

* * *

[125] MR. MOSLEY: (Interposing.)

Object to the form of the question.

BY MR. SMITH:

Q. (Continuing.) – shown there on the camera?

MR. MOSLEY: This was asked and answered early in his deposition.

THE WITNESS: Never saw that.

MR. SMITH: All right. Let's back it up again.

(Video playing.)

MR. SMITH: Right there. Whoah, whoah, whoah. No, back, back, back, back. Now stop. Right there. Stop. Stop, stop, stop.

(Video stopped.)

BY MR. SMITH:

Q. Now, we're going to go through that shooting sequence again, and I know you're saying that you did not see that. I do understand you correctly on that?

A. You are correct.

Q. Was there anything that prevented you from seeing it?

A. Looking behind me.

[126] MR. MOSLEY: Object to the form.

THE WITNESS: I'm sorry, sir.

MR. MOSLEY: That's okay.

BY MR. SMITH:

Q. You were looking behind you?

A. Yes, sir.

Q. Because you were intending to back up?

A. Yes, sir.

Q. Okay. Did you hear the shots?

A. Yes, sir.

Q. When you heard the shots, what did you do?

A. I looked forward and saw Officer Gardner with his weapon pulled and shooting.

Q. Okay. And where was the Rickard vehicle in relationship to where it is now when you saw Officer Gardner shooting?

A. In front of me over – you have to take it through, and it actually backs up and comes in front of me.

Q. Okay. So when you hear the shooting, do you stop your vehicle or do you continue backing up?

A. It's one process of backing up and pulling forward. I can't tell you exactly the second that I [127] heard the shots compared to my action inside the vehicle.

Q. Well, I made a leap in that question that may or may not be a fair conclusion, so let me narrow it down a bit. Did you ever back up?

A. Yes, sir.

Q. Did you back up at or about the time you looked behind you so you could back up?

A. Yes, sir.

Q. Okay. In other words, it all happened about the same time; and if I can make this statement, and you tell me if any part of it is wrong, you've already decided I need to get behind him, because nobody is blocking him from getting out in the rear. That's the first thing you did?

MR. MOSLEY: Object to the form of the question.

Answer.

THE WITNESS: Yes, sir.

BY MR. SMITH:

Q. And in order to pursue that, it was necessary for you to back up, because the Evans car has got you blocked on the left?

A. Yes, sir.

* * *

[131] Q. Several?

A. Several, more than two.

Q. Did you know who fired those shots?

A. No, sir.

Q. Did you know in what proximity those shots were fired to the car?

A. No, sir.

Q. Did you know if any of those shots had hit either of the occupants in the car?

A. No, sir.

Q. Now, let's roll it, and I want you to stop us when you get to the point that you see the Gardner shots.

(Video playing.)

THE WITNESS: Right there.

(Video stopped.)

BY MR. SMITH:

Q. Do you know how many shots he fired?

A. At that night, no, sir.

Q. Can you tell from the video how many he fired?

A. If we count them up, yes, sir.

Q. Okay. But you haven't done that?

A. I think its ten.

* * *

[134] MR. SMITH: Does it need to go further back?

MR. MOSLEY: Yes, I believe it needs to go further back.

(Video playing.)

THE WITNESS: Stop.

MR. SMITH: Stop.

(Video stopped.)

BY MR. SMITH:

Q. Now, we're stopped at 11:14 and 17. Has he tried to ram the other officer's car yet?

A. He already rammed Sergeant Plumoff's [sic] car.

Q. Does that show on the camera?

A. No, sir.

Q. But you saw it?

A. Yes, sir.

Q. All right. How did he ram it?

A. By using his vehicle to hit his – Sergeant Plumoff's [sic] vehicle.

Q. Whose vehicles are moving at the point of impact?

A. My vehicle.

Q. No, no. Well, I mean, between he and Plumoff's [sic]. Are both vehicles moving?

* * *

[141] MR. MOSLEY: Object to the form of the question.

Answer.

THE WITNESS: I was talking – I believe I was talking to Inspector West as he gained command of the scene once he showed up, and I explained to him in brief detail of what occurred.

BY MR. SMITH:

Q. Okay. Well, let me focus it a little differently. When you made the call regarding the felony aggravated assault charge during the pursuit, when you made the statement he tried to run some of our officers down, were any of those statements made for the purpose of trying to justify what y'all did that night?

A. No, sir.

Q. Did you make any other statements that were designed to try to justify what you did that night other than what I just mentioned?

MR. MOSLEY: Object to the form of the question.

Answer.

THE WITNESS: No, sir.

* * *

[148] he turned his wheels towards him, revved his engine, and that's when he felt that his life was in danger and he shot.

Q. That's Plumoff [sic]?

A. That's Sergeant Plumoff [sic].

Q. No recollection of what Gardner said?

A. No, sir.

Q. Okay.

MR. SMITH: All right. Now, play it.

(Video playing.)

MR. SMITH: All right. Stop.

(Video stopped.)

BY MR. SMITH:

Q. Again, that's you; is it not?

A. Yes.

Q. Can you tell from that sequence who it is you were talking to?

A. Inspector Eddie West, who is relieving me of my supervisory duties at that point.

Q. He's on the scene at that point?

A. Yes, sir.

Q. Okay. Now, the last thing you said on there was that Gardner fired the shots to protect the [149] guys behind him?

A. Uh-huh (affirmative).

Q. Yes?

A. Yes, sir.

Q. Was that your conclusion, or was that what Gardner told you?

A. No, that was my conclusion at the time, what I believed I saw at the time.

Q. Now, at the time that Gardner is firing, who is between him and the Rickard vehicle.

A. Officer Ellis. Officer Ellis was to the rear of – tell me if I'm saying the last name, Rickard.

Q. Rickard.

A. Officer Ellis was behind and to the right of Rickard's vehicle when it was backing up.

Q. Backing up or already out on the street?

MR. MOSLEY: Object to the form of the question. Do you want him to answer your question – or, do you want him to give your answer, or do you want him to give his answer? I mean.

MR. SMITH: I'll ask the questions. I'm trying to determine which

* * *

[152] where the event –

MR. SMITH: (Interposing.) No, no, I'm going to do that.

BY MR. SMITH:

Q. Well, that is the event that you talked about in the sense of where you're saying Officer Ellis is behind the car as he's backing out?

A. Can we rewind it just a little more, and you can show him closer to the car and then that?

Q. Okay.

(Video playing.)

BY MR. SMITH:

Q. Tell us when to stop.

A. Stop.

MR. SMITH: Now.

(Video stopped and frozen.)

BY MR. SMITH:

Q. Now, how far away – that's at 11:14:28, correct?

A. Yes, sir.

Q. How far away is Officer Ellis from the car?

A. No clue.

Q. Pardon me?

[153] A. I have – actual – you're asking for an estimate?

Q. Well, any way – I mean, if you don't know, which you just told us you don't know, that's fine.

A. I don't know.

Q. Do you have any estimate?

A. Four to five feet it looks like in this video.

Q. And you're basing that on what?

A. The video.

Q. You think that's four to five feet?

A. Yes, sir.

Q. Now, has Officer Gardner fired a shot yet as far as you can tell?

A. As far as I can tell, no, sir.

Q. Now, let's start the tape, and I want you to say stop as soon as you see Gardner's first shot.

(Video playing.)

THE WITNESS: Right there.

(Video stopped and frozen.)

BY MR. SMITH:

Q. That's at 11:14:31, correct, that we've stopped it?

[154] A. Yes, sir.

Q. And that's – if not just exactly, that's real close to when the first Gardner shot is fired; would you agree?

A. I would agree, yes, sir.

Q. Now, there are two officers there. Who is the other?

A. That's Officer Jimmy Evans closest to me.

Q. And does he appear to be shooting as well?

A. No, sir. He's banging on – it looks like he's – no, sir, he's not shooting.

Q. What is he doing?

A. It appears that he's hitting the window.

Q. Now, at that point when Officer Gardner fires his first shot, what direction is the Rickard vehicle moving?

A. I don't know. Rewind it and play it again.

(Video playing.)

MR. SMITH: Keep it going.

THE WITNESS: It appears to me with the first shot that I saw, he was going from reverse to forward.

(Video stopped.)

* * *

[174] MR. SMITH: I have a few, but gave [sic] me a minute. I'm looking for something.

(Off the record discussion.)

REDIRECT EXAMINATION

BY MR. SMITH:

Q. You have a couple of times mentioned a concept known as a – or, that you referred to as a rolling block. What is that?

A. It's a rolling roadblock. It's where we utilize three to four cars depending on where you're at, normally it's four cars, and the purpose behind the rolling roadblock is to slow down the fleeing vehicle where we can bring it to a stop by the use of blocking him in with our vehicles.

Basically what would happen, and you heard me refer to it get in front of them, you first need somebody in front of them to slow them down; and then you need somebody to the left and right so he'd have a hard time maneuvering around the car in front. The one in back would keep him from coming to a dead stop and maneuvering around the cars.

So basically it's there to stop a pursuit at a safe means so we can bring it to an end.

* * *

[Certificate Omitted In Printing]

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, by and through her mother SAMANTHA RICKARD as Parent and Next Friend,

Plaintiff,

No. 05-2585DV

vs.

CITY OF WEST MEMPHIS, ARKANSAS, OFFICER VANCE PLUMOFF [sic], Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER TONY [sic] GALTELLI, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JOHN GARDNER, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER LANCE ELLIS, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JIMMY

EVANS, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JOSEPH FORTHAM [sic], Individually and in his official capacity as an officer of the West Memphis Police Department, and CHIEF ROBERT PAUDERT, Individually and in his official capacity as Chief of the West Memphis Police Department,

Defendants.

DEPOSITION OF VANCE PLUMOFF [sic]
August 5, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ESTATE OF KELLY A. ALLEN, Deceased, CLAYTON DAVID ALLEN, MARIA NICOLE ALLEN, A Minor by Next Friend, Kenneth B. Allen, ALEXIS LANE ALLEN, A Minor by Next Friend, Kenneth B. Allen

Plaintiffs, No. 05-2489MaV

vs.

CITY OF WEST MEMPHIS, MAYOR WILLIAM H. JOHNSON, CITY OF WEST MEMPHIS POLICE DEPARTMENT, ROBERT PAUDERT, in His Personal and Official Capacity as Chief of the West Memphis Police Department, OFFICER VANCE PLUMHOFF, in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER JOHN BRYAN GARDNER, in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER TONY [sic] GALTELLI, in his personal and official capacity as a police officer of the West Memphis Police Department, and ANY OTHER UNNAMED OFFICERS OF THE WEST MEMPHIS POLICE DEPARTMENT, in their personal and official capacities,

Defendants.

DEPOSITION OF VANCE PLUMOFF [sic]
August 5, 2009

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* * *

[18] or the City program?

A. I was on the STEP Program, that Selective Traffic Enforcement Program.

Q. The DUI program?

A. Yes, sir.

Q. Do you do anything differently when you're on that program relative to looking for DUI suspects than you do on normal duty?

A. No, same sort of thing; just looking for traffic violations and observing the drivers, you know, subsequent to the stop and then also, you know, actually looking for probable cause of a DWI offense absent any other violations; but that's pretty much the same thing I would do to detect a DWI on regular shift.

Q. So on that program you're not restricted to DUIs, you're just an additional person out there in the field who happens to be specifically targeting those; but if something else happened, you're going to deal with that?

A. Yes. You can break away if necessary to back up other officers or if a serious offense occurs. Of course, they want your focus on that, but it's – you're – it's kind of a two phase thing. It's occupant safety and DWI.

[19] You're looking for seatbelt violations, at that time after traffic stops. I'm assuming now that the State law has changed, you could look for that as a primary stop; but you're looking for that and the

DWIs are the two things that the program really wanted you to focus on.

Q. Where were you when you first became aware of the pursuit?

A. On Martin Luther King Drive.

Q. Where in relation to Southland Drive?

A. I was south of it. I was – when I heard the first broadcast, I was in front of – probably right at Petro Road and MLK.

Q. You were pretty close, weren't you?

A. Yes, sir.

Q. As you noticed on the video yesterday, it appears your car is on and in the pursuit just very, very quickly?

A. Yes, sir.

Q. And at that point did you become primary?

A. Yes, almost immediately – well, yes, immediately, after – as soon as I saw the car.

Q. Did you have authority to terminate the pursuit?

* * *

[24] to?

Q. Yes, sir.

A. I heard Officer Fortham [sic] say he had one running, which I assumed meant he was in a pursuit; and that was the first that I was aware of it.

Q. Now, were you aware at that point of what led to that pursuit, in other words, what had gone on before then?

A. I knew Officer Fortham [sic] had made a traffic stop. Beyond that I had no knowledge of what had gone on.

Q. And how did you know he had made a traffic stop?

A. I heard him broadcast that he was making a traffic stop. I think he said at the Diamond Shamrock.

Q. Did he say what he has [sic] making the traffic stop for, what offense?

A. I don't believe so.

Q. When he broadcast that he had one running, did he indicate what the offense was at that point that he had stopped the person for?

A. No, sir.

Q. At any point during the pursuit did he or anyone else indicate what the offense was that had led

* * *

[35] night, and you're exactly where you were; and you know this guy is fleeing, and the only thing that you know is he's got a busted windshield. Wouldn't you similarly, just like you would have with the headlight, said, let's don't create the risk, let's terminate pursuit if that's all there is to this?

A. I can't really answer that yes or no without some explanation. The nature of the break in the windshield would make a difference if I can go into that.

Q. Sure.

A. If they've got a simple crack in the windshield like they hit a rock or something, that's really not anything that's going to alert me that there may be more to it than just that, their windshield is broken; but in the case where there is a round break adjacent to one of the side pillars on the vehicle and the sprinkles of glass on the dashboard would tell me that it was a more than likely recent event, I would be suspicious that someone had possibly been struck by that vehicle, like a pedestrian. I've seen that sort of break in cases where a pedestrian had been struck.

Q. Under what other circumstances have you seen that kind of break?

* * *

[56] across that lane, if he had continued in it and Officer Evans had continued, would they have collided?

A. Yes, sir.

Q. Does the video demonstrate that?

A. I'm not sure. I'd have to see it again.

Q. Have you looked at the video for purposes of verifying what you thought you saw that night?

A. Yes, sir.

Q. And when you looked at it to verify whether or not contact would have been made but for Officer Evans' evasive action, were you able to verify what you thought you saw that night?

A. In my opinion, yes.

Q. Okay. We'll look at it. I keep telling you we're going to look at it. I promise you we are.

Now, at that point Mr. Rickard is in the left-hand lane. Before he gets to the state line, did he ever change lanes again?

A. Several times.

Q. And was that as he would encounter traffic, he would maneuver through them?

A. Sometimes yes, and sometimes – again, on the bridge I tried to get him – get around him again, and he moved over towards me again to the left that [57] time. I believe at that moment I was in the inside lane and he was in the center lane when he – at that time I hadn't gotten as far up next to him. It was probably – my front wheel would have been about

even with his back wheel; and he came over to the left, and I had to drop back again.

Q. Did you announce that one?

A. I believe I did, yes.

Q. So when we get on the tape, point that out for me.

A. Yes, sir.

Q. Okay. I'll try to remind you, but help remind me as well.

As you come on across – well, is it fair to say that the entirety of the time y'all were on 40, you're encountering traffic? You can tell that from the video; can you not?

A. Yes, it was heavier at first. There was a stretch between the scales and the bridge where there was – actually right up until Danny Thomas where there was really very little traffic; but there was at least some pretty much the entire time.

Q. When he is approaching Danny Thomas, what lane was he in?

* * *

[59] cars to make your unexpected turn on to Danny Thomas?

A. Yes. There was a pickup truck pulling a boat trailer.

Q. Tell me about that.

A. It was just – it was in the lane, and I had to step on my brakes pretty hard to drop back behind him and make the turn over on to Danny Thomas.

Q. What lane was he in?

MR. HANSOM: When you say "he"?

BY MR. SMITH:

Q. The pickup with the boat.

A. It would have been either the immediate right lane or the second one, whichever one was to the right of me. I don't recall exactly which lane that I was in at that point.

Q. He makes the Danny Thomas ramp, comes on around to Danny Thomas, and goes north back up over the interstate, goes to Jackson or Parkway where it converges, takes a right, spins out into that parking lot, if you will, where all of this ultimately takes place; is that accurate?

A. He – when he came off the ramp, he actually went to I believe – I think it's called Alabama Street, because when you come off the ramp, it [60] splits. You can either go right on to Danny Thomas or straight up to Alabama; and he went right on Alabama and then right again on Danny Thomas, but he didn't actually follow the curving ramp up on to Danny Thomas.

Q. But then he comes back up over the interstate, makes the right-hand turn, spins out?

A. Yes.

Q. Now, at that point how many cars converge? I'm talking about when he, as it says on the tape, wrecks out?

A. At the time I knew of at least four; and at that time I was under the impression it was more, but I knew there was at least four.

Q. Okay. Identify those for me, please.

A. I know there was myself, Officer Evans, Lieutenant Fortham [sic]. I knew there was at least one or two other cars at that point. I don't think I knew who was driving them at that point.

Q. And as the cars converge on him in that parking lot, which number are you in order?

A. At that point I was third in the pursuit; but when he spun out into the parking lot, it – there really wasn't an order at that point, because people were turning into the parking lot.

* * *

[63] left and behind me. There was one car sort of in front of me and to the left.

Q. Was it Evans?

A. I know that now. At the time I did not.

Q. Okay. Evans was immediately to your left, and then Fortham [sic] further over to the left?

A. Not further over to the left. He was more behind me than to the left I believe.

Q. Okay. Is it fair to say that when all those cars are in there, he's not going to come out forward, he's got no room to come out forward?

A. I wouldn't – that night – I mean, looking at the videotapes now I would say yes, but that night it was pretty much up in the air which way he was going to come out.

Q. Okay. Well, it's fair enough to answer the question the way you did. What you know now is he didn't have a route out of there coming forward, you know that now looking at the tapes?

A. Not unless he was able to push a car out of the way or something like that.

Q. Okay. His only route out was backwards?

A. I believe so, yes.

Q. And by definition no one has blocked him [64] from the rear?

A. That night I really didn't know exactly where all he was blocked from, because it was all going on just really fast.

Q. Well, you know now he wasn't blocked from the rear?

A. Yes.

Q. So my next question about that is was that a conscious decision that y'all made, or was that just kind of the way it worked out?

A. Just the way it worked out.

Q. Okay. If – if y'all had done it the way you would have preferred to have done it, would you have had people surrounding him from every angle to where he could not escape?

A. That would have been the ideal solution, yes.

Q. Okay.

MR. HANSOM: Break time.

MR. SMITH: Take a break.

THE WITNESS: Yes, sir.

THE VIDEOGRAPHER: We're off the record at 11:01.

(Whereupon, a break was taken.)

[65] THE VIDEOGRAPHER: We're back on the record at 11:15.

BY MR. SMITH:

Q. Now, I want you to take me through what happened once he wrecks out. We before the break discussed where everybody positions themselves, but I want you to go from that point and tell me what happens, how the events unfold.

A. It all happened pretty quick; and when I saw that he had spun into the parking lot, I was going to try to maneuver at least somewhere in front of him. So I made a right turn into the parking lot. He started to accelerate, and at that point he was not pointed directly at me, he was a little bit offset.

I don't really know how I can explain it to you. The right fender of his car would have been more pointed at me than the front of his car, it was kind of at an angle; and as I came into the parking lot, he started accelerating and turned towards me. I mean, it was almost straight lined up; and, I mean, it was quick.

And I stood on the brakes, and I think I told my ride-along hold on or we're going to get hit or something like that; and he accelerated and hit me up [66] straight head-on collision, and his vehicle started – mine I believe stopped right there, stopped dead, and his started I thought rolling backwards.

It was – I don't know whether it was rolling backwards or backing away from me. At the time I believed it was rolling backwards, because the collision was enough where I – at that time I believed my vehicle was disabled, and I was pretty certain his was disabled at that point. So I got out of my car –

Give me just a second.

Q. You got it. You take your time.

A. I got out of my car, and I looked at their car; and the female was bent forward. It looked like she

was digging around on the floorboard; and so I drew my gun, and I ran up to their vehicle; and at this point I thought it was just rolling back from the collision, and it might have been. I don't know whether he was backing or just rolling back.

And I ran up to the car, and I knew I had vehicles and officers converging pretty much from all around me. I couldn't at that point have told you exactly who was where or what vehicle was where. I just knew I had cars to the left, to the right, behind me, and officers similarly pretty much all around me.

[67] And I ran up, and that night I believed I was standing directly in front of his wrecked front headlight and pointed my weapon into the car yelling, show me your hands, get out of the car, get out of the car, things of that nature.

And I heard the engine start to race and tires barking, squealing, whatever term you want to use, braking/traction, and it just kind of hit me all at once. It was like – like, oh, God; but I had my front sights pretty much lined up on his chest. I remember that part just as clear as a bell, and I just – it was like, oh, God, I'm about to get killed; and I squeezed.

I remember firing three rounds. I remember that just completely clearly. I had no doubt as to how many rounds I had fired; and I knew he was hit, because he snapped over to the left and then immediately just sat right back up and looked, looked forward; and then he started to – and after my third round it kind of – it breaks down from that point. I

kind of remember more freeze frames than a coherent picture of what happened.

And he backed out into the street, and I remember following kind of almost in an arc as he

* * *

[74] A. I believe before.

Q. Do you know how much before?

A. Fractions of a second. It didn't take long.

Q. At the time that you applied your brakes, what was your speed?

A. I would say between five and ten probably. I could be off in that.

Q. What was his speed at the time he hit you?

A. I would have guessed somewhere between ten and twenty; but, once again, it happened really, really fast, and so I can't give you a precise estimate.

Q. Where did the vehicles make contact?

A. As far as?

Q. Which part of his car hit what part of your car?

A. The front of his car struck the front of my car.

Q. Flush across, all the way across?

A. I believe so. If not flush, it was very close to it.

Q. Have you seen any pictures showing the damage done to the car you were in?

A. Yes, sir.

* * *

[76] stopped position before there was impact with you?

A. No, I'm not – not – I'm not certain.

Q. I may get the same answer; and I'm not asking you for certainty, because I'm betting you didn't sit there and take a measuring stick and measure it. But do you have a reasonable estimation of how far he moved from his stopped position to the time that your two vehicles made contact?

A. Somewhere less than a hundred feet would probably be about the best guess I could give you.

Q. How long, if you know, would it take his vehicle from a stopped position to reach a speed of twenty miles an hour?

A. I'm not sure. From a stopped position, I don't know.

Q. What made you think that both vehicles were disabled?

A. The – just the feeling of the crash. It was – at the time I really didn't feel any pain from it, but it

was a pretty sharp impact. I was actually shocked that the air bag didn't deploy, but just the force of impact I thought for sure they would have been inoperable.

Q. When you say you were surprised that the

* * *

[82] A. She was leaned forward, and I could see like motion in the shoulders like she was – the impression I had at the time like digging through something or trying to get something on the floorboard of the car; and that's the actual thing that prompted me to draw my weapon when I did, is seeing that, because I didn't know what she was reaching for.

Q. If that was your observation that night, was that the reason you shot?

A. No.

Q. So can we – can we leave here with the understanding that whatever it was she did is not what caused you to shoot?

A. That's correct.

Q. Further on that point, though, now that you have reviewed the video do you now see that someone else got to the car before you?

A. Yes.

Q. Who was that?

A. I believe it was Officer Evans.

Q. And is Officer Evans more or less right on top of her, though outside the car, banging on the window – windshield in front of her?

A. Looking at the videotape, yes.

* * *

[105] don't have to think?

MR. MOSLEY: You want to call the tapes 3, 4, and 5?

MR. SMITH: Yes.

MR. MOSLEY: And then I'll just get copies to him?

MR. SMITH: Yes.

MR. MOSLEY: Okay.

MR. SMITH: And this will become 6.

MR. HANSOM: Because I'm not sure how well the video is going to play.

MR. SMITH: I think it will be okay.

MR. MOSLEY: We'll see at the end of the day.

MR. HANSOM: Won't hurt to have it.

MR. CAMPBELL: Housekeeping, 3 would be 279, 4 would be 284, 5 would be 286?

(Whereupon, Exhibits 3, 4, and 5 were designated to be marked as an exhibit to the deposition of the witness

* * *

[111] MR. SMITH: I want the pursuit. I don't need the stop.

THE VIDEOGRAPHER: Okay.

Give you some audio. Ready to roll?

MR. SMITH: Uh-huh (affirmative).

(Video playing.)

BY MR. SMITH:

Q. So that's you coming in now; is it not?

A. Yes, sir.

Q. Is that you?

You can tell us to stop when you see the first event with your car.

Is that you on the left?

A. Yes.

Q. Are you behind him at that point?

A. Yes, I am.

Q. I mean, is he in that lane?

A. Yes, he's in . . .

Q. Has he changed lanes at that point?

A. I believe he has. I'm not absolutely certain.

MR. SMITH: Stop, stop, back [112] up.

(Video stopped.)

THE VIDEOGRAPHER: Back up?

MR. SMITH: A little bit.

(Cuing [sic] video.)

MR. SMITH: All right, now.

THE WITNESS: Right there you can see him move from left to right, and I'm over the fog line into the . . .

MR. SMITH: Let's back up a little bit more.

(Cuing [sic] video.)

MR. SMITH: All right.

(Video playing.)

MR. SMITH: All right. Now stop.

(Video stopped.)

BY MR. SMITH:

Q. Or at least I want you to stop it where you say you're over the fog line.

A. Okay. Have to come back a little bit.

MR. SMITH: Come back this way.

(Cuing [sic] video.)

MR. SMITH: Keep coming, keep [113] coming. Okay.

(Video playing.)

MR. MOSLEY: Do you want him to point to it when he's over the fog line?

MR. SMITH: That would be fine. I also want it to stop.

THE WITNESS: Right there.

MR. SMITH: All right. Stop.

(Video stopped.)

BY MR. SMITH:

Q. Now, the car that's over the fog line, is that yours or his?

A. Mine.

Q. How long were you over the fog line?

A. I couldn't tell you exactly. Probably a few seconds.

Q. That's at 11:11:34?

A. Appears to be, sir, yes.

Q. Which we believe to be 12:11:34 actually?

A. Approximately.

MR. SMITH: Okay. Go ahead, Rob.

(Video playing.)

THE WITNESS: There.

[114] BY MR. SMITH:

Q. Can you see that one?

A. Uh-huh (affirmative).

MR. SMITH: All right. Back it up.

(Video stopped.)

THE WITNESS: I'm sorry. I should have said stop I guess.

(Video playing.)

THE WITNESS: There.

BY MR. SMITH:

Q. Stop.

A. Right there.

(Video stopped.)

MR. HANSOM: Note the time for the record.

BY MR. SMITH:

Q. 11:11:43. Now, is that you saying he tried to ram another car?

A. No, sir. That's Lieutenant Fortham [sic].

Q. Okay. Is that something that you observed that night yourself, or did you just hear the lieutenant say it?

A. I saw it. I was looking over to the left [115] at that time.

Q. Do you make an announcement that he tried to ram another car?

A. No, sir.

Q. Did he try to ram that car at that point?

A. That's the way it appeared to me, sir.

Q. Can you tell from that video what the proximity of those two cars are to each other at the point that the lieutenant says he tried to ram him?

A. Not precisely, no.

Q. Can you tell how far the lieutenant is from those vehicles?

A. No, sir.

Q. Do you know how far you were from him at that point?

A. Once again, not exactly. It was all happening pretty fast. I couldn't tell you exactly, sir.

Q. Well, are you somewhat behind him?

A. Somewhat – somewhat behind. I don't remember whether I was looking – I wasn't looking straight over to the side. It was forward and left is as precisely as I can tell you is where their position was from me.

* * *

[117] for that, though.

MR. SMITH: Go ahead.

(Video playing.)

BY MR. SMITH:

Q. Yes, that was 11:12 and 40 seconds or so.

A. It's right here.

MR. SMITH: All right. Now stop.

(Video stopped.)

THE WITNESS: And for the next second or two when he's backing up is when I'm –

BY MR. SMITH:

Q. (Interposing.) Tell me what the significance of this is.

A. She's leaned forward, appears to be reaching for or digging around for something on the floorboard.

Q. And that's at 11:14:17? Can you see –

(Video playing.)

MR. SMITH: Hold it.

THE VIDEOGRAPHER: I'm sorry.

MR. SMITH: Just a second.

THE VIDEOGRAPHER: I'll go

* * *

[119] this time frame, maybe a little bit after.

(Freezing video.)

BY MR. SMITH:

Q. Does that show on either of the other videos, the impact?

A. It's – I think it's partially in the frame on Officer Galtelli's. I'm not positive.

Q. We'll get that one out once we finish going through this one. Now, you're to the right of this picture, correct?

A. Yes, sir.

MR. SMITH: Okay. Go ahead and run it, Rob.

(Video playing.)

MR. SMITH: All right. Stop, stop.

(Video stopped.)

BY MR. SMITH:

Q. So after the impact with your car, he backs up. And then who is that coming in to the front of him and to the right?

A. Looking at the video, it's Officer Gardner.

Q. Okay. Now, you're already at the car as [120] is?

A. I believe that's Officer Evans.

Q. You've got your gun pulled, and I think you know from looking at the video Officer Evans has his pulled as well?

MR. HANSOM: Let's just note the time for the record simply because there are questions asked about that.

MR. SMITH: You're exactly correct. 11:14:22 is where we've got it stopped.

BY MR. SMITH:

Q. So far correct? You've got yours pulled?

A. Yes, sir.

Q. Officer Evans you know from looking at the video has his pulled?

A. Right. I didn't know it that night, though.

Q. I know. You've told us that. And does it appear that as Officer Gardner is emerging from his car – does it at least appear at this point that he may be reaching for his weapon as well?

A. It's kind of hard to tell at this point.

Q. Okay. Now, how far does it appear that

* * *

[125] front edge of the front tire well and the right front corner of the front bumper.

Q. To the side?

A. Slightly to the side.

Q. Not in front of it?

A. No.

Q. Agreed?

A. That's the way it looks on the video, yes.

Q. Did it appear in the video that, in fact, the front of the car made some contact with Officer Gardner's car?

A. Yes.

Q. And not with you?

A. Correct.

Q. Where was Officer – well, let's back it up one more time and see where Officer Gardner and everybody else is.

(Video playing.)

(Video stopped.)

THE VIDEOGRAPHER: Do you want to do slow motion or regular speed?

MR. SMITH: Can you do it in slow motion?

THE VIDEOGRAPHER: Yes, like

* * *

[127] or escape hole to the back after the shooting starts?

A. I probably – not in slow-mo like this, no.

MR. SMITH: Okay. Let's put it back on regular speed.

(Video playing.)

BY MR. SMITH:

Q. He is not moving until after you fire your shots; would you agree?

A. He is not moving backwards until I fired my shots.

Q. Agreed?

A. Right.

MR. SMITH: All right. Stop it a second, Rob.

(Video stopped.)

BY MR. SMITH:

Q. So at the time that the shots are fired, his vehicle is still?

A. No, I would not agree with that.

Q. Which direction is it moving? You've already told me it wasn't moving backwards. Was it moving forwards?

A. It was pushing. Looking at the video, [128] pushing Gardner's vehicle slightly forwards.

MR. SMITH: Okay. Let's play it again.

THE VIDEOGRAPHER: Regular speed?

MR. SMITH: Until I tell you to stop, but yes.

(Video playing.)

MR. SMITH: Now, stop it right there.

(Video stopped.)

BY MR. SMITH:

Q. I want to ask you some questions about the scenario that occurs after you have shot; and we can see in the video that he's backing out and he does that half moon backout on to Jackson, and then there is Officer Gardner shooting at that spot and then somebody shooting in the direction as he pulls off?

A. Looking at the video. I mean, once again, that night I – I didn't know any of that.

Q. I know you say you didn't, but you see that now; do you not?

A. On the videotape, yes, yes, sir.

Q. Did you see any violations of policy

* * *

[132] Q. Sure.

(Cuing [sic] video and freezing.)

THE WITNESS: I'm not certain.

BY MR. SMITH:

Q. Okay. Do you see you in that frame at 28 seconds?

A. No.

MR. SMITH: All right. Bring it on forward, Rob.

THE VIDEOGRAPHER: Regular speed or slow?

MR. SMITH: Let's try slow, fast slow.

(Video playing.)

MR. SMITH: All right. Now stop.

(Video stopped and frozen.)

BY MR. SMITH:

Q. Can you tell us who is showing in the picture now as the officers at 30?

A. Can we go back just a little bit and forward the freeze frame? It's kind of hard for me to tell.

Q. Well, yes and here – yes.

[133] MR. SMITH: Go ahead, Rob.

THE VIDEOGRAPHER: Hold on, forward.

(Cuing [sic] video.)

THE WITNESS: It looks like Officer Evans closest to the camera. Past that I can't tell from that.

MR. SMITH: Let's keep going, see if we can tell.

(Video played and frozen.)

BY MR. SMITH:

Q. Now, at 31 Officer Evans is separating from the car toward its rear, and is that Officer Gardner with gun extended into the – well, pointing into the car?

A. Looking at the video I believe so.

Q. Okay. And that's at 31. Now, do you see yourself in there anywhere?

A. No.

MR. SMITH: All right. Let's bring it on forward, Rob, and slow.

(Video playing.)

MR. SMITH: Stop.

(Video stopped and frozen.)

[134] BY MR. SMITH:

Q. At 32 do you see yourself?

A. I believe this is me right here (indicating) I believe.

Q. Yes. Now, how close are you to Officer Gardner?

A. Close. I can't tell you an exact figure.

Q. Almost beside at least by the way it appears on the camera?

A. It's – it's hard to say from video. Angles can be kind of a little confusing, but I know I'm in close proximity to him.

Q. And are you telling us that you didn't even know he was shooting?

A. I didn't hear a single round.

Q. Now, unless there is something else on this film that you want to point out, I'm going to change films and show something else. But is there something else you need for us to see on here?

A. No, sir.

Q. Okay.

THE VIDEOGRAPHER: Can we go off the record for a moment?

MR. SMITH: Yes.

* * *

[140] Sorry.

(Video playing.)

MR. SMITH: All right. Stop.

(Video stopped.)

MR. SMITH: Now, Rob, let it go until he tells you to stop.

(Video playing.)

THE WITNESS: Stop.

(Video stopped and frozen.)

BY MR. SMITH:

Q. Now, what are we seeing?

A. That's where he's come forward, I'm slowing down, coming in the lot, and this, if it's not the moment of impact, is close to it.

Q. That's at 12:17 and 37.

MR. SMITH: Let's back it up. Can you back it up frame by frame, Rob?

THE VIDEOGRAPHER: Yes. I don't know that I can back it up frame by frame, but I can go – it doesn't allow me to do –

MR. SMITH: (Interposing.) Then back up just a little bit.

THE VIDEOGRAPHER: I'll have to

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[149] MR. MOSLEY: I'd like to present an award to Frank Holloman for his brevity.

MR. HOLLOMAN: There wasn't anything left.

MR. MOSLEY: I agree. I just think you deserve an award.

MR. SMITH: I have one.

MR. HANSOM: Because I've got one.

MR. MOSLEY: You go first, Ted.

CROSS EXAMINATION

BY MR. HANSOM:

Q. Lieutenant, let me just ask you, with regard to the incidents on Interstate 40 where you've indicated that Mr. Rickard's vehicle came at you, you reacted to that. What were the speeds approximately at that time?

A. At the moment where he actually came over at me?

Q. Yes.

A. The best estimate I could give you would be over seventy miles per hour. I can't nail it down at that moment any more precisely than that.

[150] Q. In order for you to maintain speed of more than seventy miles per hour, were you required to step on your accelerator?

A. Yes.

Q. And at the point his vehicle made any movement towards you, did you modify that action in any way?

A. Yes.

Q. What did you do?

A. I took my foot off the gas and put it on the brake pedal.

Q. What effect did it have on your vehicle when you took your foot off the gas?

A. Slowed down.

Q. I think you said you tapped the brake pedal?

A. Yes, sir.

Q. Do you know what caused you to slow? Was it the tapping of the brake pedal or releasing the accelerator or both?

A. I'm not certain. It could be either/or both.

Q. Okay. Thank you.

MR. HANSOM: Nothing.

* * *

[163] [Certificate Omitted In Printing]

EXHIBIT 3 TO DEPOSITION

These DVDs have been filed conventionally with the United States District Court of the Western District of Tennessee, Western Division

EXHIBIT 4 TO DEPOSITION

EXHIBIT 5 TO DEPOSITION

EXHIBIT F

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, By and through her mother SAMANTHA RICKARD As Parent and Next Friend **PLAINTIFF**

v. **CASE NO. 05-2585 D V**

CITY OF WEST MEMPHIS, ARKANSAS; OFFICER VANCE PLUMHOFF, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER TONY [sic] **GALTELLI, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JOHN GARDNER, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER LANCE ELLIS, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JIMMY EVANS, individually and in his official capacity as an officer of**

the West Memphis Police Department; OFFICER JOSEPH FORTHMAN, individually and in his official capacity as an officer of the West Memphis Police Department; CHIEF ROBERT PAUDERT, individually and in his official capacity as Chief of the West Memphis Police Department **DEFENDANTS**

AFFIDAVIT OF LANCE ELLIS

State of Arkansas)
) ss.
Crittenden County)

Before me, the undersigned authority in and for said county and state, personally appeared Lance Ellis, who is over eighteen years of age, of sound mind and after being first duly sworn did depose and say as follows:

I, Lance Ellis, being over 18 years of age and of sound mind and body, do solemnly swear and affirm:

1) I, Lance Ellis, am competent to testify to the matters herein.

2) I am a law enforcement officer employed by the City of West Memphis.

3) I was employed as such in July of 2004. My rank at that time was patrolman.

4) During the entirety of the pursuit on or about July 18, 2004, I was acting with the course and scope of my employment as a patrolman for the West Memphis Police Department.

5) I completed basic police training from the Arkansas Law Enforcement Training Academy on July 5, 1998. I believe that my conduct was consistent with all my training I have received as a police officer.

6) On or about July 18, 2004, I was one of a few officers involved in the pursuit of a white Honda accord that unlawfully fled a lawful traffic stop.

7) That the videos of patrol units 284, 286, and 279 provide a true and correct depiction of many of the events during that pursuit. I make this statement based on my own personal knowledge and after review of said tapes.

8) I was returning from checking underneath the Interstate 40 and Interstate 55 Bridges, which was routinely done at that time for homeland security purposes, when I heard Lt. Forthman make a traffic stop at Southland Dr. and Martin Luther King Blvd.

9) I advised that I was enroute to back up Lt. Forthman.

10) While en-route to backup Lt. Forthman I heard Lt. Forthman advise over the radio that the suspect he had stopped was fleeing was traveling South of Martin Luther King Blvd.

11) I joined the pursuit on Interstate 40 in Arkansas and proceeded across the Interstate 40 Bridge into Memphis, Tennessee, where we exited at Danny Thomas Blvd.

12) While on Danny Thomas Blvd I heard a broadcast over the radio that the suspects vehicle had wrecked out in a parking lot located at approximately Jackson Ave. and Danny Thomas Blvd in Memphis, Tennessee.

13) When I arrived at the parking lot, I pulled up at the left rear of another patrol unit, with the suspects vehicle positioned to my right front.

14) I immediately exited my vehicle and as I exited my vehicle I heard gunshots, but I did not know who was firing those shots.

15) I observed the suspect put his car in reverse and begin to backup. As he backed up, he began making a u-turn while still in reverse. The rear of his car came my direction and I had to move out of the way to avoid being hit by the suspect's vehicle.

16) At that time, I feared serious physical injury from the suspect's actions.

17) During the entire event the vehicle posed a danger to the safety of police officers and the public in general based upon the actions of the driver of the white Honda.

18) All of my actions were taken in good faith and with reasonable and probable cause under the circumstances. All of my actions were taken

pursuant to and in accordance with the Constitution and laws of the United States and to the best of my knowledge of the State of Arkansas and the State of Tennessee.

/s/ Lance Ellis
Lance Ellis

State of Arkansas)
) ss.
Crittenden County)

Before me the undersigned Notary Public in and for the State of Arkansas at Large, personally appeared LANCE ELLIS, and after being first duly sworn, did depose and say that the statements in the foregoing Affidavit are true and correct.

Sworn to and subscribed before me on this 19th day of November, 2009.

/s/ Sue Ellen Adamson
Notary Public

My Commission Expires: 5/7/2018

[NOTARY SEAL]

EXHIBIT G

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, By and through her mother SAMANTHA RICKARD As Parent and Next Friend **PLAINTIFF**

v. **CASE NO. 05-2585 D V**

CITY OF WEST MEMPHIS, ARKANSAS; OFFICER VANCE PLUMHOFF, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER TONY [sic] **GALTELLI, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JOHN GARDNER, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER LANCE ELLIS, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JIMMY EVANS, individually and in his official capacity as an officer of**

the West Memphis Police Department; OFFICER JOSEPH FORTHMAN, individually and in his official capacity as an officer of the West Memphis Police Department; CHIEF ROBERT PAUDERT, individually and in his official capacity as Chief of the West Memphis Police Department **DEFENDANTS**

AFFIDAVIT OF TROY GALTELLI

State of Arkansas)
) ss.
Crittenden County)

Before me, the undersigned authority in and for said county and state, personally appeared Troy Galtelli, who is over eighteen years of age, of sound mind and after being first duly sworn did depose and say as follows:

I, Troy Galtelli, being over 18 years of age and of sound mind and body, do solemnly swear and affirm:

1) I, Troy Galtelli, am competent to testify to the matters herein.

2) I am a law enforcement officer employed by the City of West Memphis.

3) I was employed as such in July of 2004. My rank at that time was patrolman.

4) During the entirety of the pursuit on or about July 18, 2004, I was acting with the course and scope of my employment as a patrolman for the West Memphis Police Department.

5) On February 12, 2004, I successfully completed Arkansas Police Corp Recruit School. I believe my conduct was consistent with that training.

6) On or about July 18, 2004, I was one of a few officers involved in the pursuit of a white Honda accord that unlawfully fled a lawful traffic stop.

7) That the videos of patrol units 284, 286, and 279 provide a true and correct depiction of many of the events during that pursuit. I make this statement based on my own personal knowledge and after review of said tapes.

8) On the night in question, I was parked at the on ramp of the Westbound Interstate 40 at Martin Luther King Blvd assisting Officer John Gardner who was conducting a traffic stop.

9) At this time I heard over the radio Lt. Forthman exclaim that he had a driver fleeing, which he described as a "runner".

10) At that time, Officer Gardner instructed me to assist in the pursuit as I was backing Officer Gardner up on a traffic stop.

11) I entered the pursuit and was one of the last officers in the pursuit.

12) Through the course of the pursuit on Interstate 40, I learned that the driver of the White Honda committed aggravated assault. I did not know the subject's identity during the pursuit.

13) During the pursuit, I heard over the radio that the White Honda's driver committed acts of aggravated assault. Upon information and belief, I ran lights and sirens during most if not all of my involvement in the pursuit. I turned my lights on as I approached the bridge after another officer informed me that my lights were not on. Upon information and belief, my lights turned off when a clip board slid off my dash and hit the switch to the lights.

14) After crossing the bridge into Tennessee, I continued in the pursuit onto Danny Thomas Blvd.

15) I continued North on Danny Thomas following the pursuit. I pulled up on Jackson Ave where my fellow police officers where [sic] stopped and pulled towards the driver's side of the suspect's vehicle and between Officer Gardner's patrol car and the building.

16) As I pulled up, I noticed smoke coming from the tires of the suspect's vehicle.

17) As I was exiting my vehicle, I heard one shot and saw glass from the windshield moving in a direction away from the car, which caused me to believe that a shot had been fired from inside the car at one of my fellow police officers.

18) At this time, I was in fear for my safety and felt the threat of serious bodily injury or perhaps death. In addition, I feared for the safety of my fellow police officers as well as the safety of the general public.

19) After I heard the shot, I drew my weapon and ran in the direction of the suspect's vehicle.

20) What I recall of the events today are that I saw the suspect's vehicle back up and then pull forward and not comply with law enforcement authority. I also know that I fired two rounds based upon the threat of serious bodily injury and death to me and my follow officers that I perceived from the white Honda.

21) I did not know that there were any other occupants in the suspect's car, other than the driver, until after the white Honda wrecked out at approximately the intersection of Jackson Avenue and Manasses.

22) Because I did not know that there were other occupants, I did not aim at the passenger of the white Honda and I did not and could not intend to hit the passenger of the Honda with a round from my gun. I do not know if the fragment that struck the passenger came from my service weapon.

23) All of my actions were taken in good faith and with reasonable and probable cause under the circumstances. All of my actions were taken pursuant to and in accordance with the Constitution and laws of the United States and

to the best of my knowledge the State of Arkansas and the State of Tennessee.

/s/ Troy Galtelli
Troy Galtelli

State of Arkansas)
) ss.
Crittenden County)

Before me the undersigned Notary Public in and for the State of Arkansas at Large, personally appeared TROY GALTELLI, and after being first duly sworn, did depose and say that the statements in the foregoing Affidavit are true and correct.

Sworn to and subscribed before me on this 25th day of November, 2009.

/s/ Elizabeth Coleman
Notary Public

My Commission Expires: 2016

[NOTARY SEAL]

EXHIBIT H

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, By and through her mother SAMANTHA RICKARD As Parent and Next Friend **PLAINTIFF**

v. **CASE NO. 05-2585 D V**

CITY OF WEST MEMPHIS, ARKANSAS; OFFICER VANCE PLUMHOFF, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER TONY [sic] **GALTELLI, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JOHN GARDNER, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER LANCE ELLIS, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JIMMY EVANS, individually and in his official capacity as an officer of**

the West Memphis Police Department; OFFICER JOSEPH FORTHMAN, individually and in his official capacity as an officer of the West Memphis Police Department; CHIEF ROBERT PAUDERT, individually and in his official capacity as Chief of the West Memphis Police Department **DEFENDANTS**

AFFIDAVIT OF JOHN GARDNER

State of Arkansas)
) ss.
Crittenden County)

Before me, the undersigned authority in and for said county and state, personally appeared John Gardner, who is over eighteen years of age, of sound mind and after being first duly sworn did depose and say as follows:

I, John Gardner, being over 18 years of age and of sound mind and body, do solemnly swear and affirm:

1) I, John Gardner, am competent to testify to the matters herein.

2) I am a law enforcement officer employed by the City of West Memphis.

3) I was employed as such in July of 2004. My rank at that time was patrolman.

4) During the entirety of the pursuit on or about July 18, 2004, I was acting with the course and scope of my employment as a patrolman for the West Memphis Police Department.

5) I attended basic police training at Arkansas Law Enforcement Training Academy, from September 29-December 20, 2002. While at ALETA I was certified as an expert in firearms on October 11, 2002.

6) Prior to July 18, 2004, I had other relevant training, which included: F.O.R.C.E. Training for SWAT Operations conducted by the West Memphis PD on February 24, 2004; Hostage Rescue/ Barricaded Suspect C.Q.B. conducted by the West Memphis P.D. on March 9, 2004; Advanced Tactical Operation Team Skills conducted by the West Memphis P.D. on March 23, 2004; and State and Local Anti-Terrorism Training conducted by the United States Attorney's Office on May 24-25, 2004. I believe my conduct was consistent with that training.

7) On or about July 18, 2004, I was one of a few officers involved in the pursuit of a white Honda accord that unlawfully fled a lawful traffic stop.

8) That the videos of patrol units 284, 286, and 279 provide a true and correct depiction of many of the events during that pursuit. I make this statement based on my own personal knowledge and after review of said tapes.

9) On the night in question, I was parked at the on ramp of the Westbound Interstate 40 at Martin Luther King Blvd conducting a traffic stop when I noticed flashing blue lights of another West Memphis police car in my vicinity.

10) At this time I heard over the radio Lt. Forthman exclaim that he had a driver fleeing, which he described as a "runner".

11) At that time, I instructed officer Troy Galtelli to assist in the pursuit as Galtelli was backing me up on my traffic stop.

12) I ended my traffic stop proceeded to my car and also began to assist in the pursuit.

13) I entered the pursuit as the last officer.

14) Through the course of the pursuit on Interstate 40, I learned that the driver of the White Honda committed aggravated assault. I did not know the subject's identity during the pursuit.

15) During the pursuit, I heard over the radio that the White Honda's driver committed acts of aggravated assault. Upon information and belief, I ran lights and sirens during most if not all of my involvement in the pursuit.

16) After crossing the bridge into Tennessee, I passed officer Galtelli and at Danny Thomas Blvd in Memphis, I passed who I believed to be officer Lance Ellis.

17) I continued North on Danny Thomas following the pursuit. I pulled up on Jackson Ave where my fellow police officers where [sic]

stopped and pulled in front of the white Honda which was stopped at the time.

18) As I was exiting my vehicle, the suspect's car rammed my car in the parking lot on Jackson Ave in Memphis.

19) I noticed Sgt. Vance Plumhoff to my left with his gun drawn approaching the passenger side of the suspect's vehicle.

20) As I approached the vehicle I heard the engine of the white Honda revving. I saw it lurch forward and then heard three gun shots.

21) The vehicle backed onto the street at Jackson Ave.

22) At this time the vehicle came to a brief stop on Jackson Ave and I believed for a moment that the pursuit had ended and the occupants would comply with law enforcement authority.

23) I had my gun drawn approaching the vehicle and was aware that other officers were fanning out to my right and left.

24) I looked at the driver, who at first appeared to be slumped over, and then observed him look down the road and saw him looking down to put the vehicle into drive.

25) At this time, I perceived an officer to my right who would have been in the direct path the white Honda was about to take.

26) The vehicle did not comply with law enforcement authority and the driver was intent on continuing to flee. At this moment, I feared

that the white Honda was going to run over a fellow officer and fired my service weapon for the purpose of stopping the vehicle and protecting my fellow officer.

27) I did not aim at the passenger of the white Honda. I did not intend to hit the passenger of the Honda with a round from my gun, and I do not know if the fragment that struck the passenger came from my service weapon.

28) During the entire event the vehicle posed a danger to the safety of police officers and the public in general based upon the actions of the driver of the white Honda.

29) At the time I carried a department issued service weapon that was a Glock Model 22, which was a .40 caliber semiautomatic handgun that held fifteen rounds in the magazine plus one in the chamber.

30) All of my actions were taken in good faith and with reasonable and probable cause under the circumstances. All of my actions were taken pursuant to and in accordance with the Constitution and laws of the United States and to the best of my knowledge the State of Arkansas and the State of Tennessee.

/s/ John Bryon Gardner
John Gardner

State of Arkansas)
) ss.
Crittenden County)

Before me the undersigned Notary Public in and for the State of Arkansas at Large, personally appeared JOHN GARDNER, and after being first duly sworn, did depose and say that the statements in the foregoing Affidavit are true and correct.

Sworn to and subscribed before me on this 25th day of November, 2009.

/s/ Elizabeth Coleman
Notary Public

My Commission Expires: 2016

[NOTARY SEAL]

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, By and through her mother SAMANTHA RICKARD As Parent and Next Friend **PLAINTIFF**

v. **CASE NO. 05-2585 D V**

CITY OF WEST MEMPHIS, ARKANSAS; OFFICER VANCE PLUMHOFF, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER TONY [sic] **GALTELLI, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JOHN GARDNER, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER LANCE ELLIS, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JIMMY EVANS, individually and in his official capacity as an officer of**

the West Memphis Police Department; OFFICER JOSEPH FORTHMAN, individually and in his official capacity as an officer of the West Memphis Police Department; CHIEF ROBERT PAUDERT, individually and in his official capacity as Chief of the West Memphis Police Department **DEFENDANTS**

AFFIDAVIT OF JIMMY EVANS

State of Arkansas)
) ss.
Crittenden County)

Before me, the undersigned authority in and for said county and state, personally appeared Jimmy Evans, who is over eighteen years of age, of sound mind and after being first duly sworn did depose and say as follows:

I, Jimmy Evans, being over 18 years of age and of sound mind and body, do solemnly swear and affirm:

1) I, Jimmy Evans, am competent to testify to the matters herein.

2) I am a law enforcement officer employed by the City of West Memphis.

3) I was employed as such in July of 2004. My rank at that time was patrolman.

4) During the entirety of the pursuit on or about July 18, 2004, I was acting with the course and scope of my employment as a patrolman for the West Memphis Police Department.

5) I have received basic police training by the Arkansas Law Enforcement Training Academy (March 31-June 21, 2002), where I was qualified as an expert in firearms on April 12, 2002. I believe that my conduct was consistent with that training.

6) On or about July 18, 2004, I was one of a few officers involved in the pursuit of a white Honda accord that unlawfully fled a lawful traffic stop.

7) That the videos of patrol units 284, 286, and 279 provide a true and correct depiction of many of the events during that pursuit. I make this statement based on my own personal knowledge and after review of said tapes.

8) That, following the pursuit I gave a recorded statement to officers of the Memphis Police Department based upon my recollection of my involvement of the pursuit, at the time of the statement. That statement is attached hereto as Exhibit 1.

9) During the pursuit while still in Arkansas I attempted to go around the suspect's vehicle – the white Honda – while on Interstate 40. At that time the suspect swerved his vehicle attempting to strike my patrol unit.

10) In an attempt to keep him from striking my patrol unit I almost lost control.

11) Under Arkansas law the aforementioned action by the suspect constituted an aggravated assault.

12) Again, on the Interstate 40 Bridge from Arkansas to Tennessee I again attempted to pass the suspect vehicle and again he turned his vehicle as if to hit mine.

13) The suspect car, after entering Tennessee took the Danny Thomas exit and proceeded northbound on Danny Thomas Blvd.

14) As we were coming up on Jackson Ave in Memphis, the suspect made a right hand turn and I again attempted to get in front of the suspect vehicle. At that time, the suspect locked his car up, I applied my brakes and began skidding and the left front of my vehicle skidding [sic] into the right rear of the suspect's vehicle.

15) The suspect vehicle then spun out into a parking lot and I exited my vehicle and attempted to make contact with the occupant of the white Honda.

16) The driver began moving his car forward in an attempt to flee again and at that time the suspects' car struck my right hand. At that time, I attempted to shatter the windshield with the handle end of my service weapon in an attempt to get to the occupants and stop the pursuit. As the vehicle came past me, I could hear it ram into a car. During this period of

time myself and other officers gave various commands to the occupants to stop the car and exit the vehicle, but at no point did the occupants comply.

17) Approximately at that time, the suspects' car was still in motion and I heard several gunshots being fired.

18) Undeterred the suspects' vehicle began to back out onto the street and I turned to run to my squad car, hearing several more shots fired.

19) During the entire event I feared for the safety for myself and the safety for other officers and the public in general based upon the actions of the driver of the white Honda.

20) At the time the white Honda lurched forward striking my hand, I feared serious physical injury to myself

21) Based on the actions of the driver, including the commission of more than one aggravated assault, the continual refusal to submit to law enforcement authority and the suspects use of force against myself personally, I believed the suspect posed a danger of serious physical injury or death to myself, my fellow officers and the public in general until the time his car wrecked out and the pursuit ended at Jackson and Manasses in Memphis, Tennessee.

22) All of my actions were taken in good faith and with reasonable and probable cause under the circumstances. All of my actions were taken pursuant to and in accordance with the Constitution and laws of the United States and

to the best of my knowledge the State of Arkansas and the State of Tennessee.

/s/ Jimmy Evans
Jimmy Evans

State of Arkansas)
) ss.
Crittenden County)

Before me the undersigned Notary Public in and for the State of Arkansas at Large, personally appeared JIMMY EVANS, and after being first duly sworn, did depose and say that the statements in the foregoing Affidavit are true and correct.

Sworn to and subscribed before me on this 19th day of November, 2009.

/s/ Sue Ellen Adamson
Notary Public

My Commission Expires: 5/7/2018
SEA

[NOTARY SEAL]

EXHIBIT 1

HOMICIDE WITNESS STATEMENT

This is the statement of: Jimmy Evans
Age: 29 DOB: [redacted] Sex: M Race: W SSN: [redacted]
Home Address: [redacted] Home Phone: [redacted]

Occupation: Police Officer Employed by: West Memphis Police Department
Work Address: 626 E. Broadway Work Phone: 870-735-1210

Next of Kin/emergency: [redacted]
Address: [redacted] Home Phone: [redacted]
Business Address: N/A Work Phone: N/A

This statement is being taken at the **Homicide Office, 201 Poplar, Room 11-21** on July 18, 2004 at 4:33 a.m.
Statement made to: Sgt. N. Berryman & Sgt. Miller
Typed by: Sgt. M. Miller

This statement is relative to the **shooting** which occurred on Jackson at Thomas on July 18, 2004 and which is filed under **MPD File # 0407008649.**

Q. Are you aware the Memphis Police department is investigating the shooting which involved the West Memphis Arkansas police department this date at Jackson and Thomas?

A. Yes, I am.

Q. Where are you employed and in what capacity?

A. I am employed by the West Memphis Police Department, as a patrolman.

Q. What unit # were you driving tonight?

A. I was driving unit #205

Q. Is that car equipped with a video camera?

A. It has an inoperable camera.

Q. Where [sic] you present when the shooting occurred at Jackson and Thomas?

A. Yes, I was.

Q. Did you fire any shots?

A. No.

Q. Do you know who fired shots?

A. I heard the shots being fired but I didn't see who was firing. I seen two officers with their guns drawn. That was Sgt. Plumhoff and Officer Gardner.

Q. In your own words could you explained [sic] what lead [sic] up to the shooting?

A. I heard an officer say on the radio that there was a vehicle running. I was traveling northbound on Martin Luther King, when I noticed two squad cars traveling southbound coming towards me. At that time I noticed a white vehicle make a turn onto the on ramp of I-40. The two squad cars were following, I started following and was the third car in the pursuit. I heard Lt. Fortham [sic] state on the radio let's try to end the pursuit. At that time myself and another unit were trying to get around him to box him in. We got separated by an eighteen wheeler, and when we got back together in front of the truck I took primary in the pursuit. The suspect went to the far-left lane

and I attempted to go around him on the right, as I attempted to go around he swerved his vehicle attempting to strike my patrol unit. In an attempt to keep him from striking my patrol unit I almost lost control. We continued on to the bridge, and as we crossed the bridge I attempted to pass him again on the right. Again he turned his vehicle as if to hit mine. At that time we were coming up on traffic, I fell in behind the vehicle. We took the Danny Thomas exit, when we got on Danny Thomas we went northbound. As we were coming up on Jackson the suspect he went wide like he was going to get in the center lane then he made a right hand turn. I tried to cut to the inside of the turn in another attempt to get in front of him. At that time be locked the car up, and I applied my brakes, and started skidding, the left front of my vehicle skidded into the right rear of the suspect's vehicle. He spun out into the parking lot at the corner of Jackson and Danny Thomas. I exited my vehicle, and attempted to make contact with the passenger or the driver. The driver of the vehicle, the suspect, began moving forward in an attempt to flee again. I had my service weapon in my hand, the car moved forward striking my right hand. I struck the upper right corner of the windshield, attempting to shatter the windshield. I reholstered my weapon, and attempted to retrieve my baton out of the holster. As I turned my back I heard several shots being fired. I turned around as to duck, and when I turned back around I saw Sgt. Plumhoff with his weapon drawn. The suspect began backing out as I was attempting to get to the passenger's door to open it. At that time I heard several

more shots being fired, After those shots were fired, the suspect vehicle backed on out into the street. I turned to run to my squad ear and as I am running to my car I hear several more shots being fired. At that time they took off traveling east on Jackson. I notified dispatch that I was no longer in the pursuit. I heard someone on the radio say that they had one out on foot, I think it was Lt. Forthman, I got in my car and went down to the scene where the car was wrecked out on a porch on Jackson. Lt. Fortham [sic] advised me to go back down and secure the crime scene where the shooting happened.

Q: Describe the suspect's vehicle?

A: A small white compact car.

Q: Describe the driver?

A: I can't, a male, white with salt and pepper hair was all that I saw.

Q: Describe the passenger?

A: Female, white with blonde hair and a white top.

Q: Do you know what the charges were on the suspect's [sic] when the pursuit started?

A: No, I do not know what the initial charges were.

Q: Were you injured during this incident?

A: Just a small scratch on my right hand where the suspect's car him [sic] me.

Q: Did you see the suspect's vehicle hit or attempt to hit anyone other than yourself?

A: No I was to busy trying to get into the vehicle. As I approached the vehicle on the passenger side I kept my eyes on the driver. He came past me I could hear him ram another car, but I concentrated on his hands.

Q: Where was your vehicle parked in relation to the suspect's vehicle?

A: My right front was to his right front.

Q: Did you or any other officer's give verbal commands to the suspects when they stopped at Jackson and Danny Thomas?

A: Yes, I gave the command to stop the car and exit the vehicle, it probably wasn't those exact words. I could hear another officer yelling to get out of the car but I don't know who it was.

Q. Is there anything else you could add to your statement that would aid in this investigation?

A. Not that I can think of.

Q. I will now asked [sic] you to read over your 3 page statement and if it is true and correct initial the right corners of the first three pages and sign, date and time the last. Will you do this?

A. Yes.

/s/ Jimmy Evans 07/18/04

Signature Date/Time

RECORD AND BRIEFS

No. 12-1117

Supreme Court, U.S.
FILED
DEC 30 2013
OFFICE OF THE CLERK

In The Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX VOLUME II

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Petition For Certiorari Filed March 12, 2013
Certiorari Granted November 15, 2013

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DEPOSITION OF JOSEPH FORTHAM [sic]

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, by and through her mother SAMANTHA RICKARD as Parent and Next Friend,

Plaintiff,

vs. No. 05-2585DV

CITY OF WEST MEMPHIS, ARKANSAS, OFFICER VANCE PLUMOFF [sic], Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER TONY [sic] GALTELLI, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JOHN GARDNER, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER LANCE ELLIS, Individually and in his official capacity as an officer of the West Memphis Police

Department, OFFICER JIMMY EVANS, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JOSEPH FORTHAM [sic], Individually and in his official capacity as an officer of the West Memphis Police Department, and CHIEF ROBERT PAUDERT, Individually and in his official capacity as Chief of the West Memphis Police Department,

Defendants.

DEPOSITION OF JOSEPH FORTHAM [sic]
August 4, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ESTATE OF KELLY A. ALLEN, Deceased, CLAYTON DAVID ALLEN, MARIA NICOLE ALLEN, A Minor by Next Friend, Kenneth B. Allen, ALEXIS LANE ALLEN, A Minor by Next Friend, Kenneth B. Allen

Plaintiffs,

vs. No. 05-2489MaV

CITY OF WEST MEMPHIS, MAYOR WILLIAM H. JOHNSON,

CITY OF WEST MEMPHIS POLICE DEPARTMENT, ROBERT PAUDERT, in His Personal and Official Capacity as Chief of the West Memphis Police Department, OFFICER VANCE PLUMHOFF, in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER JOHN BRYAN GARDNER, in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER TONY [sic] GALTELLI, in his personal and official capacity as a police officer of the West Memphis Police Department, and ANY OTHER UNNAMED OFFICERS OF THE WEST MEMPHIS POLICE DEPARTMENT, in their personal and official capacities,

Defendants.

DEPOSITION OF JOSEPH FORTHAM [sic]
August 4, 2009

* * *

[14] supervising the officers, or a lot of times we're inside the station checking paperwork, answering questions or complaints from anybody who would need that answer.

Q. And what does the supervising officer do in performing their duties?

A. Many tasks that we take on through an eight hour shift, from the scheduling of our officers to making sure the calls are taken care of when they're dispatched, answering dispatcher's questions, answering any officer's questions, making scenes with officers, supervising our officers, making sure they're making the right decisions, intervening if they're making a wrong decision on a shift.

We're there to help. We're there for them. That's what we're there for, is to make sure they're taken care of and that the City is taken care of.

Q. You were, if I understand correctly, the officer who initially pulled over the vehicle that led to the events that we're here to talk about; am I correct?

A. Yes, sir.

Q. Where did that occur?

[15] A. The initial contact occurred at Southland Drive and Martin Luther King Boulevard.

Q. Give me a geographic orientation.

A. Northeast side of town.

Q. And is that more of a side street type area, or is that a main –

A. (Interposing.) That's one of our busiest streets in West Memphis.

Q. Ultimately there was a pursuit that went into Memphis that resulted in a shooting, you know about all that?

A. Yes, sir.

Q. And we're going to talk about that at length, but were you at the scene when the shooting occurred?

A. Yes, sir.

Q. Did you fire your weapon?

A. No, sir.

Q. Did you exercise your discretion and judgment not to fire your weapon?

A. I never – I never got out of my car.

Q. Where were you in proximity to the victims' vehicle when you were in your car at that scene?

* * *

[28] several times.

I asked him about the beer that I saw in between the passenger and driver's seat, Keystone beer, asked him if he had anything to drink. He said no. I noticed that he was real nervous, and I just noticed that his hands were shaking, he kept passing over his driver's license or I.D. card. I never did get to see if it was a driver's license or I.D. card. I just noticed he had one in his wallet.

Q. So when he was talking to you, was his speech clear?

A. I don't remember.

Q. Did you smell alcohol on him?

A. I didn't smell alcohol standing outside the car, no, sir.

Q. At that point you have asked him about the windshield, you've asked for the – presumably the license, registration, and insurance information, all three?

A. I can remember asking him for his driver's license.

Q. Okay. And he clearly was looking for those?

A. He was –

* * *

[30] to separate him from her so I could talk to him and get him outside so I could actually get his driver's license and hopefully calm him down, because I noticed he was real nervous.

Q. Now, that wasn't the first person you ever saw being nervous after having been pulled over, was it?

A. I'm still nervous when I get pulled over, so yes.

Q. That's not unusual, is it?

A. No, it's not unusual.

Q. Okay. Now, what had she answered for him other than about the windshield?

A. That's about it.

Q. Okay. Now, at that point your thought process was I'm going to question him some more, but I want to do it separate from her?

A. Yes, sir.

Q. What other questioning were you intending to do?

A. Get his driver's license out so he could – at least get his driver's license so I could identify him and investigate the part of the beer that I saw in the back, because if I can get him out, get [31] him closer to me, I can at least smell his breath, look at his eyes, check his – how he stands.

Like I said, I was working DWI, so I was investigating possibly a DWI with a drug – the alcohol that I saw in the back between the passenger and driver seat.

Q. When you say it was between the passenger and driver seat, was it in the back seat?

A. No, sir.

Q. Where was it?

A. Right here (indicating), just if – like on the hump. It was sitting right on the hump, not in the

back seat, because the back seat was filled with an assortment of items in the back seat.

Q. Was the beer can that you saw open or not?

A. I didn't see a beer can. I just saw the case of beer.

Q. Oh. A case?

A. Appeared to be a case of beer.

Q. A case being twenty-four cans?

A. I have no clue. If I would have got that far, I could tell you; but I didn't get that far.

Q. It was a box?

A. It was a box.

[32] Q. A carton?

A. Yes.

Q. You don't know how many beers would have been contained in there?

A. No, sir.

Q. Could you tell if the carton was open or closed?

A. No, sir.

Q. And obviously there is nothing wrong with transporting beer. If you bought beer, you can certainly put it in your car and take it home?

A. Yes, sir.

Q. Okay. But having seen that, you wanted to at least see if he had had anything to drink?

A. Yes, sir.

Q. Did you ask him if he had had anything to drink?

A. Yes, sir.

Q. And what did he say?

A. I believe he said no.

Q. That's your best recollection?

A. My best recollection.

Q. And did you have a flashlight on him?

A. Yes, sir.

* * *

[38] A. Yes, sir.

Q. Now, at that point still the only thing that you know of that he is guilty of is driving with a headlight out?

A. There is two things now, is the busted windshield.

Q. Okay. That's a violation as well?

A. Yes, sir.

Q. Okay. Those would be the only two things that you know that he would be citable for, if you will, at that point?

A. If he complied with everything, at that point, yes, sir.

Q. Okay. Now, when he takes off, what do you do?

A. I go back to my unit, get inside my vehicle, and start pursuing him.

Q. At the point that he took off, did you consider that he was fleeing?

A. Yes, sir.

Q. Was that pretty obvious to you?

A. That was pretty obvious, yes, sir.

Q. Was it obvious to you only because instead of getting out, he left; or was it obvious to you

* * *

[40] A. He was in, no, sir.

Q. What about the one you were in?

A. How fast can that car go is your question?

Q. Yes, sir.

A. Yes, sir, I know how fast that car can go.

Q. How fast can it go?

A. Can get up to a hundred and twenty-five miles an hour.

Q. Did you ever do that that night?

A. No, sir.

Q. How fast did you go?

A. I have no clue, but I know I didn't go a hundred twenty-five miles an hour.

Q. Did you get over a hundred?

A. Maybe.

Q. Now, when you got back in and you recognized that he was fleeing, you indicated that you started pursuit?

A. Yes, sir.

Q. What else did you do?

A. There was radio traffic on the radio; and as soon as I could get in to the radio traffic, I called break, I've got one running.

Q. What does that mean?

* * *

[43] appreciation was of that policy on that night when you initiated the pursuit.

A. Yes, sir.

Q. So when you on that night saw him fleeing and you chose to pursue, was it your understanding that it was okay by department policy to pursue for a misdemeanor violation?

A. Yes, sir.

Q. Did you consider the headlight and/or the windshield to be misdemeanor violations, or were they ordinance violations?

A. Misdemeanor violations.

Q. Okay. And misdemeanor violations by State law or City law?

A. State law.

Q. So were you – if – if you had written him that night, would you have written him a State citation?

A. Yes, sir.

Q. When you began that pursuit that night, other than – I mean, did it go through your mind, can I pursue because this is just a misdemeanor? I mean, did you have that thought process?

A. I can't recall if I – if that thought

* * *

[46] Q. Were you either the supervising or the primary officer in that pursuit?

A. I was the primary for a brief moment in that pursuit, but I was the ranking officer in that pursuit at that time.

Q. Who was the primary officer in that pursuit?

A. I was primary at first, then I believe Sergeant Plumoff [sic] became primary.

Q. Why?

A. Because he got in front of my vehicle when he turned on to 240 from MLK.

Q. Is that what dictates primary?

A. Yes.

Q. Who is closest?

A. First car is primary, second car is secondary.

Q. Who was the supervisor?

A. Supervisor on duty was Sergeant – or, Lieutenant Dana Dykes.

Q. Did either of them ever give instructions to terminate the pursuit?

A. No, sir.

Q. Now, I've noted four things that you said

* * *

[49] pursuit should be terminated?

A. Could be, but right now I can't recall.

Q. What about safety?

A. Yes, sir.

Q. Is that part of it?

A. Yes, sir.

Q. And tell me what consideration was given to safety in the departmental policy.

A. If the weight of catching a fleeing suspect outweighs – that may be saying this backwards, but outweighs the – or, the danger to the citizens is greater than our need to catch this person, we would terminate the pursuit.

Q. Is another way of saying that if the risk of harm to the public is greater than the need to catch that fleeing suspect, that's reason to terminate?

A. Yes, sir.

Q. Was there danger to the public in this pursuit?

A. Yes, sir.

Q. Was it a significant danger?

A. Definition of significant.

Q. Well, let me ask you this. Did the policy call for you during a pursuit, no matter what it was [50] for, to continually exercise your judgment about whether to proceed or terminate based on the danger created to the public?

A. We evaluate that throughout the whole pursuit, yes, sir.

Q. Okay. And if you ever reach the judgment that there is a significant danger created by the

vehicles in the pursuit, are you supposed to terminate?

A. Yes, sir.

Q. Was there ever a point in this pursuit where you thought there was a significant danger to the public caused by this pursuit?

A. Given what I think you're saying about the significant danger and compared to my evaluation throughout the whole pursuit, I did not feel at that time given where we were at, our location, that we should have terminated that pursuit because of that danger to the public.

Q. Now, at the beginning of this you're on Southland?

A. Yes, sir.

Q. It's late at night, correct?

A. Early in the morning.

Q. Well, post midnight?

[51] A. Yes, sir.

Q. Much traffic around?

A. Some traffic.

Q. Is it much less than normal volume for that street, say, during the day or the prime evening hours?

A. Yes, sir.

Q. Much less?

A. Yes, sir.

Q. Okay. Once you get on to 40, how was the traffic?

A. Started off on 40 with some traffic, and then it thinned out. It got much thinner after we got through a bit of traffic.

Q. Was there ever a point in time where public cars, if you will, just people who happened to have been on I-40 that night, were not in close proximity to this pursuit? Was there ever a point where the pursuit was isolated from the public?

A. No, sir.

Q. The public was always in the mix, if you will?

A. They could see it, yes, sir.

Q. Well, isn't it true that during the [52] pursuit on 40, both the vehicle that's fleeing and the police cars are having to move in and out of that traffic and change lanes to get around it?

A. Yes, sir.

Q. That was always the case; was it not?

A. I can't say that, because there were probably some times that there was a stretch of road where we – it was just us; but, yes, there was traffic. Pretty much throughout there was some traffic.

Q. You would agree with the fact that for the most part there was traffic around the pursuit?

A. Yes, sir.

Q. Was any of that traffic ever hit by any of the cars?

A. No, sir.

Q. While on I-40 to the point – well, let's determine the beginning and end points. He gets off at Danny Thomas once he gets over into Memphis?

A. Yes, sir.

Q. Where did he get on to I-40?

A. From Martin Luther King Boulevard in West Memphis.

Q. And how far is it from MLK and I-40 to the

* * *

[58] that, that's when Officer Jimmy Evans went to my left of him and I decided just to supervise and to set up my – monitor the radio and supervise the pursuit.

Q. So your initial decision to drop back was based on safety considerations?

A. Yes, sir.

Q. Because of the degree of traffic?

A. Yes, sir.

Q. Did the other two vehicles then, the Evans and the Plumoff [sic] vehicles, have to deal with that same traffic?

A. We all had to deal with that traffic.

Q. Well, when you say you decided to back off and take a supervisory role, what did that amount to?

A. Since I was the ranking officer, I pulled back and allowed the junior officers to take the pursuit and I would supervise. That way I had an objective – or, a – I was able to see the whole pursuit and to make sure that the officers were doing right and that I can just – pretty much just supervise and either be able to – if I need to call off the pursuit, call off the pursuit or continue and direct if I need to direct.

Q. Did you have the authority to call off the [59] pursuit?

A. Yes, sir.

Q. I thought you told me earlier that would have been Officer Dykes and Officer Plumoff [sic]?

A. I was still a supervisor. I was still in a supervisory capacity.

Q. Were all the cars in the pursuit West Memphis police officer cars?

A. Yes, sir.

Q. Was there ever a point where you thought you should call off the pursuit?

A. No, sir.

Q. Was there ever a point where you considered calling off the pursuit?

A. No, sir.

Q. Was there ever a point where you asked for advice on whether or not the pursuit should continue?

A. No, sir.

Q. You were intent on continuing the pursuit until you got him?

A. Yes, sir.

Q. Including, obviously, if that went on in to Tennessee?

A. Well, I take that back. In listening to [60] your – until you – listening to your question that you had, you said until I got him. That would be the – my yes, sir would not be a correct answer.

Q. Go ahead and explain.

A. No, sir, that would – not until I got him; until I felt that there was a need for us to terminate that pursuit.

Q. At what point would safety of the public create such a need in your judgment?

A. Given that pursuit that night?

Q. Yes, sir.

A. If he had turned right and went downtown Memphis where there is still people partying, getting into a congested area of pedestrians, cars, given that scenario I would have terminated the pursuit.

Q. When he turned north on to Danny Thomas, what did you know about the pedestrian count in that vicinity?

A. When we turned, I didn't notice any pedestrians in that area.

Q. So was it your intent, then, to just make the judgment as you went along?

A. Every second is a judgment call, yes, sir.

Q. And when we started this, I told you I

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[62] Q. Was there any reason why you did not advise the other officers that this was a traffic stop about a headlight and windshield?

A. Any reason why I did not advise them of the charges?

Q. Yes, sir.

A. That night that would be reasons of handling the pursuit, would be supervising the pursuit. I knew what the charges were, but just to come – come over the radio and tell them what the charges were, I did not do that.

Q. Well, you've got at least two other people who can terminate that pursuit that were involved, Officer Dykes and Officer Plumoff [sic], correct?

A. There would actually be three other people that could do that.

Q. Who was the third one?

A. Inspector Eddie West.

Q. And where was Inspector West?

A. I have no clue where he was at the time of the pursuit.

Q. Was he in communication?

A. No, sir. After the pursuit was over with, he was communicating with me.

[63] Q. But during the pursuit Officer Dykes and Officer Plumoff [sic] both had termination authority?

A. And Inspector West, yes, sir.

Q. Well, is he – does Inspector West even know this pursuit is going on?

A. I have no clue.

Q. Okay. Assuming that he does not, at least there are two people other than yourself who could terminate?

A. Sure, yes.

Q. Plumoff [sic] and Dykes?

A. Dykes, yes, sir.

Q. Isn't it necessary for them as people with terminating authority to have all the information that they need in order to make the judgment of whether to terminate or not?

A. Putting myself in their shoes, I would need the information to tell you if the – to terminate or not.

Q. Well, isn't it one of the things that you're supposed to consider in continually, as you said you would do, using your judgment about whether or not to terminate – isn't one of the primary things that you're supposed to use in making that judgment is weigh [64] the seriousness of the committed offense against the danger of the pursuit?

A. Yes, sir.

Q. Now, at least Officer Dykes and Officer Plumoff [sic] are unable to make that judgment because they don't even know what the offense is, correct?

A. Yes, sir.

Q. At any point did Officer Plumoff [sic] question whether or not there should be a termination that you know of?

A. No, sir.

Q. When I say question, I mean something you can hear being broadcast?

A. The only part in the broadcast that I heard is when Officer Evans asked if to terminate the pursuit and Sergeant Plumoff [sic] said negative or no.

Q. Where did that conversation take place?

A. On Danny Thomas.

Q. Near the end?

A. Yes, sir.

Q. So Officer Evans is one of the officers in the chase?

A. Yes, sir.

Q. Officer Plumoff [sic] is primary because he's [65] closest?

A. You talking about the time Officer Evans asked?

Q. Well, you tell me.

A. At the time Officer Evans asked, no, Sergeant Plumoff [sic] was not primary.

Q. Who was primary?

A. He was in front of me, so – and there was a couple of cars in front of that. I know he wasn't primary at that time.

Q. So as long as – if he was not primary at that time, did he have the authority to terminate?

A. Being a sergeant, yes, sir.

Q. And he gave instructions not to terminate?

A. That's correct.

Q. And he gave those instructions without knowing what the offense was?

A. At that time he knew what the offense was. We had aggravated assault charges on him.

Q. And is that something that happened at the initial stop, or is that something that you say happened later?

A. Happened on the Arkansas side.

Q. Okay.

[66] A. Of the pursuit.

Q. Did you see that?

A. I saw the aggravated assault committed, yes.

Q. What did you see?

A. I saw Officer Evans on the inside lane trying to pass his – the white Honda on the left, and he came over to block that to keep him from going by him.

Q. He pulled in front of him?

A. He –

MR. MOSLEY: (Interposing.) I'm sorry. Who is "he"? I'm sorry. I'm really sorry. I've gotten lost with all the he's.

BY MR. SMITH:

Q. The Rickard car.

A. Rickard car.

Q. Pulled in front of the Evans car?

A. Right.

Q. Rickard.

A. Rickard?

Q. Rickard.

A. Rickard.

[67] Q. It pulled in front of Evans in the inside lane to keep him from getting in front of him?

A. Yes, sir.

Q. And who called that an aggravated assault?

A. When you attempt to use your vehicle – okay. Who?

Q. The question right now is who made that call. Who made the, quote, call that this was an aggravated assault?

A. The initial call that came out of aggravated assault was I believe by Sergeant Plumoff [sic].

Q. Okay. You heard it?

A. On the radio, yes, sir.

Q. You saw it?

A. The initial one, no, sir. The second one, where I saw, yes, sir.

Q. The initial one is what I thought we were talking about, is where – so let's make sure that – the one that you have described where the Rickard car moves over and into the inside lane so that the Evans car can't pass it, is that the first one or the second one?

A. I believe that would be the second one.

Q. That's the one you saw?

[68] A. That's the one I saw.

Q. Is it on your camera?

A. Yes, sir.

Q. So you can see that on the video when we see it?

A. Yes, sir.

Q. Now the one that occurs before that occurs where?

A. On I-40 as well.

Q. Where on I-40?

A. Prior to that one. That one was near the weigh station I believe.

Q. And what did you hear about that since you did not see it?

A. That I believe Sergeant Plumoff [sic] came and said they have aggravated assault charges. I could – I believe that's true.

Q. Okay. But you don't know what the action was?

A. No, sir. At that point, no, sir.

Q. When – when Officers Dykes and Plumoff [sic] are acting in their capacity that included the ability to terminate without the information about the offense that would let them make the judgment of is this a [69] serious enough offense to continue the pursuit, do you know whether the policy says if somebody changes lanes in the pursuit, blocks you from getting past them, that that automatically becomes a felony under the department's policy?

A. Can you say that for me one more time?

Q. I think that would be an excellent idea. When the first officer, whomever it is, on the radio says I've got an assault, did you assume that was based on vehicle movement?

A. I didn't assume at that time I don't believe.

Q. What did you assume?

A. I can't tell you what I was assuming at that time, how the aggravated assault happened.

Q. Now, is it your understanding that during the pursuit itself on I-40 there never was any contact

between the Rickard vehicle and any of the police vehicles?

A. On I-40, no contact.

Q. So when you heard I've got an assault or whatever it was that was said, do you remember who said that?

A. The –

* * *

[72] going to have to go on into Tennessee with him?

A. After the felony occurred, yes, sir.

Q. The felony meaning?

A. Aggravated assault.

Q. Yes. And was that the first one or the second one?

A. First one.

Q. Okay. And that was about at the weigh station? Did I –

A. (Interposing.) In the proximity of.

Q. So at that point you don't care if he's going into Tennessee or not, y'all are going to go after him?

A. On the felony charges, yes, sir.

Q. What was Memphis' pursuit policy compared to your own?

A. I don't know.

Q. Never been told that?

A. Never studied it, never looked at it.

Q. Are you telling me that when y'all went in there that night, you were totally unaware that Memphis has a no pursuit policy?

A. I've heard that there is a no pursuit policy, but I've never seen it, I never read it.

[73] Q. When you realized at the weigh station that you've got to go to Tennessee, you're going to Tennessee because this is now a felony, did you call Officer Dykes or anyone else and say call Memphis and tell them what's happening?

A. I asked Dispatch to call Memphis.

Q. At what point did you do that?

A. When we got over into Memphis.

Q. Right now I'm asking back – how far is the weigh station from the state line?

A. I don't know.

Q. Miles?

A. Maybe a mile.

Q. At that point why did you not have Dispatch contact Memphis and say you've got a high speed pursuit coming into town?

A. I did when we got over – I think we were close – on the bridge or close to the bridge. I can't

exactly remember when I said contact Memphis or Shelby County. I remember asking after I got over, what about Memphis or Shelby County.

Q. After you got over?

A. After I got across the bridge, I remember asking about Memphis or Shelby County. I could have –

[74] Q. (Interposing.) Who did –

A. (Interposing.) Go ahead. I'm sorry.

Q. Who did you ask?

A. Dispatch.

Q. What did Dispatch tell you?

A. They didn't.

Q. No response?

A. No response.

Q. Did Memphis or Shelby County assist you in – once the pursuit came in to Tennessee?

A. At the end of it.

Q. At the end meaning what?

A. When the crash happened.

Q. After the shooting?

A. Yes, sir.

Q. But while the pursuit is still taking place, you never got assistance from Memphis or Shelby County, did you?

A. That's correct.

Q. How long would you estimate that the pursuit had been taking place up to the point where somebody says felony, assault?

A. Minute or two, minute maybe.

Q. So you've gone from Southland and MLK to

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[81] offense was?

A. That's true, that's correct.

Q. So up until the time of that call that we've got a felony, it was your judgment that this fleer [sic] with a windshield and headlight violation was a serious enough offense to justify the risk of the pursuit?

A. Yes, sir.

Q. And you certainly recognized there was risk?

A. There is risk in every pursuit, yes, sir.

Q. Risk to the officers?

A. Yes, sir.

Q. Risk to the fleeing person or persons?

A. Yes, sir.

Q. And risk to the general public?

A. Yes, sir.

Q. When you get over into Memphis, did you see him exit on to Danny Thomas?

A. Yes, sir.

Q. Where were you in relationship to his vehicle and the other officers?

A. Behind him.

Q. Were you last in the line?

* * *

[83] Q. And you never got out of your car?

A. No, sir.

Q. Before he spun out, what was the last communication you recall hearing on the air?

A. Me giving direction of travel.

Q. And who are you giving it to?

A. Dispatch.

Q. Okay. Clearly the cars in the pursuit know which way he's going?

A. Yes, sir.

Q. Now, what is your reason for giving that to Dispatch?

A. Hopefully Memphis can help us and give our – we always like to give our location in case something happens.

Q. How many times did you give direction of travel to Dispatch before you got to the weigh station?

A. Number, I don't know; but I was calling – I was pretty much calling the pursuit at that time.

Q. Would you say it was several times?

A. I'd say so, yes, sir.

MR. SMITH: Off for just a second.

THE VIDEOGRAPHER: We're off [84] the record at 11:09.

(Whereupon, a break was taken.)

THE VIDEOGRAPHER: We're back on the record at 11:27.

BY MR. SMITH:

Q. In a moment we're going to look at the video and spend some time on it, but I want to ask you first when you first heard at or around the weigh station one of the other officers say that there was a vehicle assault, he tried to ram me, or whatever it was he said, did you conclude that converted it from a misdemeanor to a felony?

A. Yes, sir.

Q. Felony being vehicular assault?

A. Aggravated assault, yes, sir.

Q. All right. You didn't know what the maneuver was, but you heard one of the other officers say it?

A. Yes, sir.

Q. Did it ever occur to you as one of the people with terminating authority that vehicular assault carries with it by definition some risk of harm?

A. Yes, sir.

[85] Q. Risk of harm to the vehicles involved in the alleged assault?

A. Property damage?

Q. Property damage first.

A. Yes, sir.

Q. Potential physical injury or death to the people in those vehicles?

A. Yes, sir.

Q. And also potential involvement of citizen vehicles?

A. Yes, sir.

Q. When you heard of that change in circumstances, did you make the judgment that your policy requires to determine whether it was really worth that safety risk to keep this pursuit up?

A. Through the whole pursuit, yes, sir.

Q. And you thought that it was worth the risk that was created to the public, to the officers, and to the people in the fleeing car that y'all get him?

A. Yes, sir; at that time, yes, sir.

Q. Well, then later there is a second indication of alleged vehicular assault, which you actually witness?

A. Yes, sir.

[86] Q. Did you consider the movement of the Rickard vehicle to be a vehicular assault?

A. Yes, sir.

Q. Aggravated assault?

A. Yes, sir.

Q. Did you consider that it created a danger?

A. For everybody involved and citizens, yes.

Q. Did you make a conscious judgment at that time hey, it's happened again now, we need to consider whether this is worth the risk that's being created?

A. Yes, sir.

Q. Did you make that judgment?

A. Yes, sir.

Q. And you still decided that no matter the risk that he was creating, not only in the pursuit, but in the aggravated assaults, it was worth getting him?

A. Worth pursuing him, yes, sir, at that time.

Q. Did you ever during the pursuit say – and I ask this simply because we had a little bit of a preview while we were off the record of the video and someone on the air said shut him down before he gets to Memphis. Was that you?

A. Yes, sir.

[87] Q. Why were you concerned about shutting him down before he gets to Memphis?

A. Because at that time it was a misdemeanor violation; and if it continued to be a misdemeanor violation, we – I would have discontinued the pursuit prior to crossing the state line.

Q. Why?

A. Because ninety-nine percent of the time we don't cross state lines with – for a misdemeanor violation.

Q. Does it say that in your policy?

A. No, sir, I don't believe so.

Q. Then where did you get the idea to terminate pursuit when you hit the state line?

A. Through ranking officers higher than me that didn't allow us to go to Memphis on misdemeanor charges.

Q. Who told you that?

A. I can't tell you exactly who told me that.

Q. In what environment or context did that –

A. (Interposing.) Shift meetings.

Q. Okay. Clearly talking about pursuit policy? Had to be talking about pursuit policy, didn't it?

* * *

[89] instruction in writing?

A. I cannot recall.

Q. During that meeting or any other meeting as part of your training, orientation, continuing training, did they ever instruct you on how to weigh the judgment of pursuit when it was a misdemeanor?

A. Say that again, please.

Q. For instance – let me give you a for instance, and then I'll try to say it again. Did they ever say, look, if you've got a person that's DUI and they're running and they're creating a danger just by being drunk, look at that differently than you do somebody who might have a taillight out and runs from you.

Did you ever get that type of distinction in the misdemeanor judgment call you're supposed to make?

A. In general conversation we probably talked about several scenarios of when to do it, when not to do it type deal.

Q. Tell me in – whether it was in general conversation, anything that you considered part of your training, what you were to carry with you on your job

day to day, tell me what you took in from your [90] superiors as to how to make that judgment.

A. Given the total – totality of the circumstances of what's going on around you, who is around you, time of day, the violation that is being committed. All of this is what we take in and we have to think of throughout the pursuit when it starts.

Q. What I'm trying to focus on right now is were you ever instructed that certain misdemeanors more or better justified pursuit than others? And I gave an example of a DUI versus a taillight out. There may be others that are better than that.

But were you ever told that maybe some misdemeanors would justify pursuit better than others?

A. I don't think I have, I was told that.

Q. Well, then in your own judgment did you consider that some misdemeanors were easier to justify pursuit than others?

A. Yes, sir.

Q. Give me some examples that you would use.

A. Speeding violation, which is a misdemeanor, all the way up to domestic battery third, which a [sic] misdemeanor. Battery includes violence, which is still a misdemeanor, but speeding is something different.

* * *

[92] Q. Were there other officers than yourself that night on this special state program, the DUI program?

MR. MOSLEY: Object to the form of the question, asked and answered.

THE WITNESS: Yes.

BY MR. SMITH:

Q. How many?

A. Two that I know of.

Q. Okay. I think you did say that. Were they ones involved in this chase?

A. Yes, sir.

Q. Tell me again who it was.

A. Myself and Sergeant Plumoff [sic].

Q. Was there another one?

A. No, sir, not that I know of.

Q. When the pursuit went from MLK and Southland to around the weigh station when the first assault call occurred, when you heard that first assault call made, did you consider that the gravity of this situation had just escalated?

A. Yes, sir.

Q. Did you consider that the risk of harm had just escalated?

[93] A. Yes, sir.

Q. When you at whatever later point it was on 40 hear the second assault call, did you consider that the risk of harm had escalated yet again?

A. Yes, sir.

Q. But on neither of those occasions did you exercise your discretion to back off weighing the risk of harm to the seriousness of the offense charged?

MR. MOSLEY: Object to the form of the question.

THE WITNESS: That's correct.

BY MR. SMITH:

Q. Okay. What I want to do is go through the video with you, and I will tell you before we start this process that there is no set way we're going to do this. We can go all the way through it once, we can stop as we go, I'll stop at your request, I may stop it sometimes, we may do it more than once. We're just going to kind of make our way through this process until we've covered everything.

So I think we know that we're going to pick up the video from your car at the point you with your lights warn him to pull over, and then we'll just kind of play it by ear as we go along, okay?

* * *

[101] A. Little bit further back.

MR. SMITH: Little further back.

THE WITNESS: There.

MR. SMITH: Okay.

(Video stopped.)

MR. MOSLEY: Gary, do you want him to point to it?

MR. SMITH: Yes.

(Video playing.)

THE WITNESS: (Indicating.) That's Jimmy, that's Plumoff [sic]; first one, second one.

BY MR. SMITH:

Q. I see. So when he's changing lanes, you're calling that aggravated assault?

MR. MOSLEY: Object to the form of the question.

THE WITNESS: No, sir.

MR. MOSLEY: You can answer.

THE WITNESS: No, sir, not when he's changing lanes.

MR. SMITH: Go ahead and stop.

(Video stopped.)

[102] THE WITNESS: He just happened to be going from one lane to another when he used his

vehicle intentionally to keep – or, to even run Officer Evans off the road to keep him from going past him.

BY MR. SMITH:

Q. Did he run Officer Evans off the road?

A. Thank goodness he didn't, no, sir.

Q. Did Officer Evans have to take any evasive action?

A. As you see in there, he had to move his vehicle to the left and probably slow down, if I'm looking at it right.

MR. SMITH: Let's back up and take a look at that.

(Video playing.)

THE WITNESS: Had to go to the left.

MR. SMITH: All right. Back it up. Stop it and back it up.

(Video stopped.)

MR. SMITH: I want to go through that in slow-mo.

THE VIDEOGRAPHER: This one we

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[107] THE VIDEOGRAPHER: (Interposing.) And let me say this. I set it up so we don't have to go through a lot of time to switch. It will just take about ten seconds to switch it over.

MR. SMITH: Let's switch it over and do it the other way.

THE VIDEOGRAPHER: All right. I'm not sure where we were on this.

(Video playing.)

MR. SMITH: That's the very end of it.

(Video stopped.)

(Off the record discussion.)

BY MR. SMITH:

Q. Now, again, you tell us where to stop.

(Video playing.)

THE WITNESS: Stop.

MR. SMITH: Rob, stop.

(Video stopped.)

BY MR. SMITH:

Q. Now, can you tell how far that the Rickard vehicle is in front of the Evans vehicle at the time Rickard changes lanes?

[108] A. From my vantage point, no.

Q. Even sitting here today you don't know how far in front of him he was, do you?

A. Not on the video, no, sir.

Q. Well, you just don't know period, you don't know how far he was?

A. That's correct.

Q. Okay. Do you know what the speed of the Rickard vehicle was when he changed lanes?

A. No, sir.

Q. Do you know what the speed of the Evans vehicle was when he changed lanes?

A. No, sir.

Q. Do you know what kind of movement Evans made?

A. Appeared from the video that he had to move to the left and slow down.

Q. When you say it appears from the video, can you tell if he did either one of those?

A. Yes, sir.

Q. Can you tell how far he moved to the left?

A. No, sir.

Q. Can you tell how much he slowed down?

A. No, sir; but from my vantage point from [109] where I was at, it appeared that he was using his vehicle to –

Q. (Interposing.) Did you consider that to be an improper lane –

MR. MOSLEY: (Interposing.) Wait.

BY MR. SMITH:

Q. I'm sorry if I cut you off.

MR. MOSLEY: Please finish your answer.

THE WITNESS: From my vantage point from here it appeared that he was using his vehicle to run him off the road to keep him from going by him.

BY MR. SMITH:

Q. That's two different things. Did you think he was doing both?

A. Yes, sir.

Q. Did he succeed?

A. At both of them? Yes, sir, in my opinion, yes, sir.

Q. So you think he ran Evans off the road?

A. An attempt to run him off the road.

Q. Okay. Did he run him off the road?

[110] A. No, sir.

Q. Did he keep him behind him?

A. Yes, sir.

Q. He succeeded in that?

A. Yes, sir.

Q. Now, forgetting that you called it an aggravated assault just for the moment, I know that's what you said, did you consider it an improper lane change?

MR. MOSLEY: Object to the form of the question.

Answer.

THE WITNESS: Never crossed my mind that it was an improper lane change.

BY MR. SMITH:

Q. Was it an improper lane change?

A. I didn't even know if he had his blinker on or not; but given what I'm looking at, I don't know. If we can rewind it and watch it again, I could tell you.

Q. Is there such a charge as improper lane change?

A. Yes, sir.

Q. Is that a misdemeanor?

[111] A. Yes, sir.

Q. So even up to now you have not evaluated his movement as to whether or not it was an improper lane change?

A. No, sir.

MR. SMITH: Okay. Rewind it, and we'll make that assessment now.

Okay. Now go.

(Video playing.)

MR. SMITH: You can stop it.

(Video stopped.)

BY MR. SMITH:

Q. Now when you said he tried to ram another car, what did you mean?

A. He tried to use his vehicle to keep police officer – hit the police officer's vehicle.

Q. You're saying he tried to hit it?

A. Yes, sir. It appeared to me he tried to use his vehicle to hit the other vehicle.

Q. Was that the assessment that you made that night and the reason you used the word he tried to ram it?

A. Yes, sir.

Q. But you made that assessment you're [112] telling us and as part of that concluded a felony had just occurred, and you did not even know the proximity of the Rickard vehicle to the Evans vehicle, correct?

A. That would be correct. As far as – as far as how far the vehicle was away from that vehicle, that's correct.

Q. I mean, you've told me twice already I think you don't know how far Rickard was in front of Evans?

A. Correct.

Q. So you don't know whether he was trying to ram him or just get in front of him where he couldn't get around him?

A. It appeared to me that he tried to ram him from my vantage point.

Q. And it appeared to you that he tried to ram him even though you didn't know the proximity of the vehicle?

MR. MOSLEY: Object to the form of the question. I'm going to let you ask it one more time, Gary.

BY MR. SMITH:

Q. Go ahead.

A. Ask it again for me.

[113] Q. You're telling us that you made the judgment he tried to ram him and you did not even know the proximity of the vehicles to each other?

A. That's correct. Now, having seen it again, was it an improper lane change?

A. I couldn't answer yes or no on that.

Q. Why not?

A. Because it's – the quality of the video and I can't tell if he had his blinker on or not. Officer Evans would have to answer that question for you.

Q. Is it an improper lane change only if you don't use a blinker?

A. I think there is different reasons why.

Q. What are the reasons that you know of?

A. I have to look at the – look, it's been two years since I've been in law enforcement.

Q. Do any others come to mind other than failure to use a blinker?

A. I have to look at the statute, but now – two years later after retirement I'd have to look at the statute.

Q. Okay. All right.

* * *

[115] somebody questions to discontinue the pursuit?

A. Yes, sir.

Q. Who was that?

A. Officer Jimmy Evans.

Q. And the answer negative was from?

A. Sergeant Plumoff [sic].

Q. Okay.

MR. SMITH: Go ahead.

THE VIDEOGRAPHER: Mr. Smith, we're really out of tape on this. I need to make a quick tape change.

MR. SMITH: Okay.

THE VIDEOGRAPHER: Off the record at 12:42 (sic).

(Off the record discussion.)

THE VIDEOGRAPHER: Were back on record at 12:25.

MR. SMITH: All right. Roll it.

(Video playing.)

MR. SMITH: Stop it.

(Video stopped.)

BY MR. SMITH:

Q. Now, the time where we paused is 11:14 and

* * *

[117] MR. SMITH: Now, stop it right there.

(Video stopped.)

MR. SMITH: Pull it back. I want you to stop it, if you can, before the Rickard vehicle backs up.

(Video playing.)

MR. SMITH: Now, right there.

(Video stopped.)

BY MR. SMITH:

Q. Okay, Now, that's at 11:14 and 18 seconds on your clock, correct?

A. Yes, sir.

Q. Now, whose vehicle is to your left?

A. Officer Jimmy Evans.

Q. And is Officer Plumoff's [sic] vehicle to your right?

A. Yes, sir.

Q. Now, is that store one that sits sort of between the convergence of Jackson and Parkway?

A. Yes, sir.

Q. When the Rickard vehicle wrecked out, as was called on the tape, did it hit that building?

A. No, sir.

[118] Q. Do you know that?

A. Yes, sir.

Q. How do you know that?

A. Because I never saw it hit the building.

Q. Okay. Now, at that point can he move forward and get out of that parking lot?

A. No, sir.

Q. Is his only avenue of escape now to back up?

A. Yes, sir.

Q. Now, we're going to start the tape again; and we may run this sequence through several times, but what I want to know right now is when you made the decision that you needed to block the rear egress point, I want you to stop the tape, okay?

A. Okay.

MR. SMITH: All right. Play it, Rob.

(Video playing.)

THE WITNESS: Stop.

(Video stopped.)

BY MR. SMITH:

Q. At that point we see somebody getting out of the car to your right. Again, that is – is that [119] Officer Plumoff [sic]?

A. Sergeant Plumoff [sic], yes.

Q. And the Rickard vehicle is in the process of backing up, correct?

A. Yes, sir.

Q. And there is nobody back there?

A. That's correct.

Q. All right.

MR. SMITH: Rob, start it again; but I want you to be prepared to stop real quick.

(Video playing.)

MR. SMITH: Now. Stop, stop.

(Video stopped.)

BY MR. SMITH:

Q. Whose police vehicle just came into the scene?

A. Officer Gardner's.

Q. That's at 11:14:21 seconds where we're stopped now? Yes?

A. Yes, sir.

Q. Now, is that Officer Evans that went up and used his gun to hit on the windshield?

A. Is that his gun?

[121] MR. SMITH: All right. Rewind it again.

(Video playing.)

THE WITNESS: Yes, sir. He has his weapon pulled.

(Video stopped and frozen.)

BY MR. SMITH:

Q. Okay. And so at least at this point we've got two officers with their weapons pulled with the vehicle trying to escape to the rear at 11:14:21 P is where we're stopped, correct?

A. Yes, sir.

MR. SMITH: Now, I want you to roll it just very quickly, Rob, and we're going to see is it Officer –

BY MR. SMITH:

Q. Did you say Gardner to the right?

A. This vehicle here, sir (indicating)?

Q. Yes, sir.

A. Yes, sir.

Q. Let me before we roll it ask you – I know you distinguished earlier between what you see in the video or what you recall from that night. Did Officer Gardner also pull his service weapon?

[122] A. Yes, sir.

Q. Were there any more officers who pulled their weapons that night other than those three?

A. With the knowledge that I have now?

Q. Well, let's start with what you knew that night. We're going to do it both ways.

A. Okay.

Q. Based on the knowledge you had that night, were those the only three?

MR. HANSOM: At any point that night or up to –

MR. SMITH: (Interposing.) Well, while we're still here at this location.

THE WITNESS: Up to this point I didn't know anybody had their weapons pulled at that point with my – that night.

BY MR. SMITH:

Q. Well, you can see that, can't you, what we're seeing there?

A. I can see this, yes.

Q. I mean, that night you could see what was in front of you, couldn't you?

[123] A. Yes, sir.

Q. You knew before shots were fired that there were officers that had their weapons pulled, didn't you?

A. I don't recall.

Q. One way or the other?

A. One way or the other.

Q. Did you ever before any shots were fired say, you know, don't use your weapons?

A. No, sir.

Q. Did anybody give a directive not to use the weapons?

A. No, sir.

Q. Now, you distinguished earlier between what you saw or knew that night and what you know now. What is that distinction in terms of who had weapons out?

A. I knew – now I know that Officer Plumoff [sic] – Sergeant Plumoff [sic] had his weapon, Officer Jimmy Evans had his weapon, Gardner had his weapon out, Officer Galtelli had his weapon out, and I still don't know if Officer Ellis had his weapon out or not. I can't remember – from even looking at the video I can't remember if Officer Ellis had his weapon out or not.

[124] MR. SMITH: All right. Go ahead and roll it again. (Video playing.)

MR. SMITH: All right. Stop it.

(Video stopped.)

BY MR. SMITH:

Q. Who is the first officer to start shooting?

A. The knowledge I'd had that night, I thought – what I saw, I thought Officer Gardner was shooting, because he's the only one that I saw shoot that night; but given the video that I look at, Sergeant Plumoff [sic] was the first person that shot his weapon.

Q. But first – what you saw that night was Gardner?

A. Officer Gardner.

Q. Was it in the sequence we just saw?

A. No, sir.

Q. Was it later?

A. Yes, sir.

Q. All right. Are you telling us you didn't see that sequence –

* * *

[129] he's answered it two times now.

Answer.

THE WITNESS: Ask again, please.

BY MR. SMITH:

Do you know if you were still backing up or if you were moving forward when the shots – when you first heard the shots?

A. I don't know.

Q. But you know you were moving?

A. Yes, sir.

Q. Now, eventually does the Rickard car get out in front of you?

A. Yes, sir.

Q. Do you pursue it down the street?

A. Yes, sir.

Q. And eventually it hits the house?

A. Yes, sir.

Q. Were you the closest car to it in pursuit?

A. Yes, sir.

Q. All right. Now, let's come back to where we are here. You say that the first shots you saw fired were by Officer Gardner?

A. Yes, sir.

[130] Q. Where is the Rickard vehicle at that point?

A. In front of –

Q. (Interposing.) On the street?

A. On the street, yes, sir.

Q. And is he firing at it going away from him down the street?

A. When I first saw it, he was firing at it in front of – to the side – it was – he was standing wherever he was standing in reference to it, but he was to the right-hand side of the vehicle.

Q. Okay. Well, when we get to that point, will it show on your camera?

A. Yes, sir.

Q. Okay. So we can stop it there?

A. Yes, sir.

Q. Okay. When you saw that – up to that point when you actually say you physically for the first time saw shots being fired by Officer Gardner, had you heard multiple shots having been fired already?

A. Yes, sir.

Q. Did you have any idea how many shots had been fired?

A. No, sir.

[131] Q. Several?

A. Several, more than two.

Q. Did you know who fired those shots?

A. No, sir.

Q. Did you know in what proximity those shots were fired to the car?

A. No, sir.

Q. Did you know if any of those shots had hit either of the occupants in the car?

A. No, sir.

Q. Now, let's roll it, and I want you to stop us when you get to the point that you see the Gardner shots.

(Video playing.)

THE WITNESS: Right there.

(Video stopped.)

BY MR. SMITH:

Q. Do you know how many shots he fired?

A. At that night, no, sir.

Q. Can you tell from the video how many he fired?

A. If we count them up, yes, sir.

Q. Okay. But you haven't done that?

A. I think it's ten.

[132] Q. That Officer Gardner fired?

A. Officer Gardner.

Q. That's – you say that based on having looked at the film before?

A. And him telling me that he fired ten shots.

Q. That he did?

A. He did.

MR. SMITH: Okay. Go ahead and roll the rest of it at least up until shortly after the crash. I'll tell you when to stop it.

(Video playing.)

BY MR. SMITH:

Q. If you need to stop it in there anywhere – again, we're looking at your video at 11:14 and 35.

Now, there is where he crosses, goes into the yard and up into the house, correct?

A. Yes, sir.

MR. SMITH: All right. Stop it.

(Video stopped.)

BY MR. SMITH:

[133] Q. Now, you just said to West Memphis that he tried to run over some of our officers, correct?

A. Yes, sir.

Q. That was you saying that?

A. Yes, sir.

Q. What were you referring to?

A. Because I saw him initially ram Sergeant Plumoff's [sic] vehicle,

Q. All right. Well, let's go back and look at that.

MR. SMITH: Back it up, Rob, to where we had it before.

(Video playing.)

MR. SMITH: Back it up, back it up.

BY MR. SMITH:

Q. Now, what I want you to –

MR. SMITH: Stop it there.

(Video stopped.)

BY MR. SMITH:

Q. What I want you to do is stop it where you say he tried to ram the other officer's car.

MR. MOSLEY: May I interject, Gary?

[134] MR. SMITH: Does it need to go further back?

MR. MOSLEY: Yes, I believe it needs to go further back.

(Video playing.)

THE WITNESS: Stop.

MR. SMITH: Stop.

(Video stopped.)

BY MR. SMITH:

Q. Now, we're stopped at 11:14 and 17. Has he tried to ram the other officer's car yet?

A. He already rammed Sergeant Plumoff's [sic] car.

Q. Does that show on the camera?

A. No, sir.

Q. But you saw it?

A. Yes, sir.

Q. All right. How did he ram it?

A. By using his vehicle to hit his – Sergeant Plumoff's [sic] vehicle.

Q. Whose vehicles are moving at the point of impact?

A. My vehicle.

Q. No, no. Well, I mean, between he and Plumoff's [sic]. Are both vehicles moving?

[135] A. I'm looking at his vehicle.

Q. So you don't know whether Plumoff [sic] was moving or not?

A. No, sir.

Q. So you really don't know who hit who, do you?

A. He hit him.

Q. How do you know that?

A. Because I saw him. I saw Rickard – Rickard?

Q. Yes.

A. Rickard hit Sergeant Plumoff's [sic] vehicle.

Q. Well, I thought I understood you to say you did not know whether Plumoff's [sic] vehicle was moving or not?

A. That's correct.

Q. Okay. So as far as you know, it could have been both vehicles moving that struck when they struck, correct?

A. Could be.

Q. Okay. Do you know even now having looked back at the video whether the Rickard vehicle is still in the aftermath of having wrecked out or he's still reacting from having spun out and wrecked out?

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[147] where he had discussed what had happened.

MR. SMITH: But he hasn't told me what it was.

THE WITNESS: I can't remember the exact verbiage of our conversation.

BY MR. SMITH:

Q. What was the gist of it? What did you walk away from there that night believing was – he had said his reason was for shooting?

A. That he attempted to run over – Sergeant Plumoff [sic] said he'd turned his wheels towards him is what I'm remembering that day, accelerated or – and then he fired his shots.

(Video playing.)

MR. SMITH: Stop it. Stop it. Don't run it.

(Video stopped.)

BY MR. SMITH:

Q. So your best recollection now is Gardner's justification was that he had seen Rickard try to run over –

A. (Interposing.) No, sir. I said that was Sergeant Plumoff's [sic]. I can't remember what Gardner told me that morning; but I remember Sergeant Plumoff [sic] said [148] he turned his wheels towards him, revved his engine, and that's when he felt that his life was in danger and he shot.

Q. That's Plumoff [sic]?

A. That's Sergeant Plumoff [sic].

Q. No recollection of what Gardner said?

A. No, sir,

Q. Okay.

MR. SMITH: All right. Now, play it.

(Video playing.)

MR. SMITH: All right. Stop.

(Video stopped.)

BY MR. SMITH:

Q. Again, that's you; is it not?

A. Yes.

Q. Can you tell from that sequence who it is you were talking to?

A. Inspector Eddie West, who is relieving me of my supervisory duties at that point.

Q. He's on the scene at that point?

A. Yes, sir.

Q. Okay. Now, the last thing you said on there was that Gardner fired the shots to protect the [149] guys behind him?

A. Uh-huh (affirmative).

Q. Yes?

A. Yes, sir.

Q. Was that your conclusion, or was that what Gardner told you?

A. No, that was my conclusion at the time, what I believed I saw at the time.

Q. Now, at the time that Gardner is firing, who is between him and the Rickard vehicle.

A. Officer Ellis. Officer Ellis was to the rear of – tell me if I'm saying the last name, Rickard.

Q. Rickard.

A. Officer Ellis was behind and to the right of Rickard's vehicle when it was backing up.

Q. Backing up or already out on the street?

MR. MOSLEY: Object to the form of the question. Do you want him to answer your question – or, do you want him to give your answer, or do you want him to give his answer? I mean.

MR. SMITH: I'll ask the questions. I'm trying to determine which [150] it is.

BY MR. SMITH:

Q. Was it when he was backing up or already out on the street?

A. Backing up on to the street.

Q. Before he gets on the street?

A. Backing up on to the street.

Q. Okay.

MR. SMITH: All right. Let's go back and back up to that sequence again.

(Cuing [sic] video.)

MR. SMITH: All right. Now, stop it right there. Stop it there.

(Video stopped.)

BY MR. SMITH:

Q. Now, we're going to roll it here in a second, and you tell us when to stop when you can show us what you just described with Gardner's relationship to the car and – the other officer who was behind you said was who?

MR. MOSLEY: Ellis.

THE WITNESS: Officer Ellis.

MR. SMITH: Okay. [151] All right. Roll it, Rob.

(Video playing.)

THE WITNESS: Right there.

MR. SMITH: All right. Stop.

(Video stopped.)

MR. SMITH: Now, pull it back just a hair, Rob. No, no, no, the other way.

THE VIDEOGRAPHER: I know. It has to go forward first, sorry.

(Video playing.)

MR. SMITH: Stop. Stop right there.

(Video stopped and frozen.)

THE WITNESS: Officer Ellis (indicating).

BY MR. SMITH:

Q. Okay. Now, that's at 11:14 and 29 seconds, correct?

A. Yes, sir.

Q. Now –

MR. MOSLEY: (Interposing.) You mean where he stopped the tape is at 11:14:29, not where – are you asking [152] where the event –

MR. SMITH: (Interposing.) No, no, I'm going to do that.

BY MR. SMITH:

Q. Well, that is the event that you talked about in the sense of where you're saying Officer Ellis is behind the car as he's backing out?

A. Can we rewind it just a little more, and you can show him closer to the car and then that?

Q. Okay.

(Video playing.)

BY MR. SMITH:

Q. Tell us when to stop.

A. Stop.

MR. SMITH: Now.

(Video stopped and frozen)

BY MR. SMITH:

Q. Now how far away – that's at 11:14:28, correct?

A. Yes, sir.

Q. How far away is Officer Ellis from the car?

A. No clue.

Q. Pardon me?

[153] A. I have – actual – you're asking for an estimate?

Q. Well, any way – I mean, if you don't know, which you just told us you don't know, that's fine.

A. I don't know.

Q. Do you have any estimate?

A. Four to five feet it looks like in this video.

Q. And you're basing that on what?

A. The video.

Q. You think that's four to five feet?

A. Yes, sir.

Q. Now, has Officer Gardner fired a shot yet as far as you can tell?

A. As far as I can tell, no, sir.

Q. Now, let's start the tape, and I want you to say stop as soon as you see Gardner's first shot.

(Video playing.)

THE WITNESS: Right there.

(Video stopped and frozen.)

BY MR. SMITH:

Q. That's at 11:14:31, correct, that we've stopped it?

[154] A. Yes, sir.

Q. And that's – if not just exactly, that's real close to when the first Gardner shot is fired; would you agree?

A. I would agree, yes, sir.

Q. Now, there are two officers there. Who is the other?

A. That's Officer Jimmy Evans closest to me.

Q. And does he appear to be shooting as well?

A. No, sir. He's banging on – it looks like he's – no, sir, he's not shooting.

Q. What is he doing?

A. It appears that he's hitting the window.

Q. Now, at that point when Officer Gardner fires his first shot, what direction is the Rickard vehicle moving?

A. I don't know. Rewind it and play it again.

(Video playing.)

MR. SMITH: Keep it going.

THE WITNESS: It appears to me with the first shot that I saw, he was going from reverse to forward.

(Video stopped.)

* * *

[156] (Video stopped.)

MR. SMITH: Okay.

MR. HANSOM: Note for the record the time, please.

MR. SMITH: 11:14 and 31 is the time.

BY MR. SMITH:

Q. So you believe that's about the time he's going from reverse to forward?

A. Yes, sir.

Q. Okay.

A. Well, you asked me if this is where his first shot is. This would be his first shot.

Q. Okay. Now, you indicate that he – or, you told us earlier that he indicated to you he fired ten shots?

A. Yes, sir.

Q. Correct? Did you conclude that he fired all ten of those to protect the officer?

A. Yes, sir.

Q. Ellis?

A. Officers and other people.

Q. Okay. Well, let's see the next nine then.

MR. SMITH: Go ahead and roll

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[158] A. Yes.

Q. We know the car is moving forward during basically all of those shots, isn't it?

A. That the car is moving forward basically through all of Gardner's shots?

Q. Yes.

A. If you're asking me for a – basically all of them, yes. I would not say all of them that he's moving forward.

Q. But basically all of them?

A. Basically all of them.

Q. Okay. When that car starts going in the other direction, it's not a threat to the people that are behind the car, is it?

A. No, sir.

Q. Agreed?

A. At that point, at this point, no, sir.

Q. Well, I mean, at this point he's already down the road. But, I mean, once it starts going in the other direction, it no longer constitutes a threat to people behind; do you agree?

MR. MOSLEY: Object to the form of the question.

THE WITNESS: I'd say due to

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[164] record at 1:37.

BY MR. SMITH:

Q. While we were off the record, I asked you to review Exhibits 1 and 2, Exhibit 1 being the West Memphis Police Department policies and procedures for police pursuits and Exhibit 2 being the West Memphis Police Department policies and procedures for deadly force, to see if these did appear to be the policies and procedures that were in effect at the time this happened.

And you have reviewed those; have you not?

A. Yes, sir.

Q. Do they appear to you to be the policies and procedures for those two subjects in place when this event happened?

A. Yes, sir.

Q. And you told me early on in the deposition you did not know whether there had been a change in those policies from when you first came with the Police Department at least on pursuit up until – I frankly don't remember what time period you put it through. But did they ever change as far as you know?

A. I don't remember them changing it.

Q. On either one?

[165] A. On either one.

Q. Okay. You told me a few minutes ago that there was this conversation between you and the other officers in the chase back at the department in the early morning hours, whatever it was, 5:00 or 6:00 o'clock, discussing the events of the night. Do you recall that?

A. Yes, sir,

Q. I believe you used the term, and you may not have, so forgive me if I'm remembering incorrectly, that that was sort of an unofficial conversation that y'all were having?

A. Yes, sir.

Q. Was it an Internal Affairs investigation?

A. The conversation we were having between each other?

Q. Yes.

A. No, sir.

Q. Did you ever participate in an Internal Affairs investigation with respect to the events of that night?

A. I was never questioned by an Internal Affairs officer.

Q. Are you telling me that you were never [166] involved in an Internal Affairs investigation regarding these events?

A. That's correct.

Q. Did you have any knowledge of whether or not one was done?

A. I have – I do believe one was done, yes, sir.

Q. And why do you believe that?

A. Just remembering I believe that the – that they talked about one was completed, and they were – found that one was completed.

Q. Do you know who told you that?

A. I don't.

Q. Did you in any way supply any information to that investigation?

A. I was never questioned by an AIA.

Q. I know you told me that. I'm asking you if you supplied information to them in any other form.

A. If they used my statement that I made over in West Memphis – or, in Memphis, that's the only way that I could have supplied anything, if they got that statement.

Q. And that statement was given to whom?

A. To the homicide detectives in Memphis.

* * *

[172] shot –

A. (Interposing.) No, sir.

Q. (Continuing.) – that night?

A. No, sir.

Q. Did anybody to your knowledge?

A. To my knowledge I believe Memphis Police Department took their weapons.

Q. Do you know whether or not weapons of anyone else other than the three officers who fired their weapons were taken?

A. Just those three officers.

Q. Do you know if anybody fired a shotgun that night?

A. Nobody fired a shotgun.

Q. Did you know some time during that incident during the night that the two subjects in the Rickard car had died?

A. Yes, sir.

Q. When did you find that out?

A. Officially found out that morning when I got back to the Police Department.

Q. So on the scene you didn't – you didn't know?

A. No, sir.

[173] Q. Did anyone try to establish their condition at the scene?

A. Yes, sir.

Q. Who was that?

A. Officer Evans. I believe Officer Evans told me that he still had pulse, and I believe they said both of them had a pulse at one time; and I – I remember asking again, but I don't know if I ever got a second question; but I remember them saying they have a pulse, and that's when I told Officer Ellis to stay up there by the vehicle with them.

Q. But you do know that they did die?

A. Yes, sir.

Q. And the firing of the guns by the three officers was not accidental, was it?

A. No, sir.

Q. So it was an intentional firing of the weapons?

A. From what I learned, yes, sir.

Q. I believe that's all I have. Thank you.

A. Thank you, sir.

MR. MOSLEY: Give me just a minute. I think I'm done. I don't have any questions.

* * *

[182] knowing what you know now, were all six already involved in the chase?

A. Yes.

Q. During the misdemeanor phase?

A. Yes.

Q. Okay. Do you agree that an objective and reasonable officer, police officer should follow the law?

MR. MOSLEY: Object to the form of the question.

MR. HANSOM: Object to the form.

THE WITNESS: Given what – just in his normal daily routine?

BY MR. SMITH:

Q. Well, under any circumstance do you agree than [sic] objective and reasonable police officer should follow the law?

MR. MOSLEY: Object to the form of the question.

THE WITNESS: We all should follow the law, yes.

BY MR. SMITH:

Q. Do you agree that an objective and [183] reasonable police officer should follow the policies and procedures of their department?

MR. MOSLEY: Object to the form of the question.

THE WITNESS: Yes.

BY MR. SMITH:

Q. When you – strike that. I want to ask you something else first. Was this the first high speed pursuit you'd ever been in?

A. No, sir.

Q. How many had you been in?

A. Numerous.

Q. Give me your best estimate.

A. I can't tell – it's a lot of pursuits I've been in.

Q. Dozens?

A. That's fair.

Q. Have all of them been apprehended as a result of the pursuit, or did some of them get away?

A. Yes, sir.

Q. Both?

A. Yes, sir.

Q. Okay. As a general rule do you catch [183 inadvertently repeated in original exhibit.] reasonable police officer should follow the policies and procedures of their department?

MR. MOSLEY: Object to the form of the question.

THE WITNESS: Yes.

BY MR. SMITH:

Q. When you – strike that. I want to ask you something else first. Was this the first high speed pursuit you'd ever been in?

A. No, sir.

Q. How many had you been in?

A. Numerous.

Q. Give me your best estimate.

A. I can't tell – it's a lot of pursuits I've been in.

Q. Dozens?

A. That's fair,

Q. Have all of them been apprehended as a result of the pursuit, or did some of them get away?

A. Yes, sir.

Q. Both?

A. Yes, sir.

Q. Okay. As a general rule do you catch [184] them, or do they get away?

A. Depends.

Q. Well, however many dozens you've had or how many you've had, percent-wise have you apprehended most of them, or did most of them get away?

A. Thirteen years of law enforcement, I – it's a fair give and take.

Q. You don't know?

A. I don't know.

Q. If you don't know, you don't know. Were there any others where the person or persons fleeing died as a result of the events?

A. No, sir.

Q. Were there any of your chases where any public citizens were injured or killed as a result of the pursuit?

MR. MOSLEY: What was your – public?

MR. SMITH: Citizens.

MR. MOSLEY: Public citizens.

MR. SMITH: Yes, I think that's the term he wanted me to use.

MR. MOSLEY: Civilians.

MR. SMITH: I'm sorry.

* * *

[187] would the action he took with his car?

A. If I was – I know you're just throwing this out there, and I want to understand what you're trying to say. If he pointed – if he had his car and he put it in drive and he drove towards me with that car intending to hurt me or kill me with that car,

compared to taking a weapon out of his – out and pointing that gun at me in intent to kill me, would I take that gun more –

Q. (Interposing.) No. Let me –

A. (Interposing.) Help me out with this.

Q. First of all, can we agree that he did not have a gun that night?

A. We can agree.

Q. And she did not have a gun?

A. None was found, that's correct.

Q. As far as you know –

A. (Interposing.) As far as I know.

Q. (Continuing.) – even now they were not armed?

A. As far as I know, yes, sir.

Q. Okay.

A. Other than – now – yes, as far as I know, because a gun was not found.

[188] Q. Well, okay. Other than what?

A. We – I didn't search the vehicle, and I don't know who searched the vehicle.

Q. Did any one of the officers there that night, West Memphis officers say to anyone they were armed or they pulled a gun or it looked like they were

going to shoot the officers? Did anybody say that that night?

MR. MOSLEY: Object to the form of the question.

THE WITNESS: No, not to me.

BY MR. SMITH:

Q. Have you heard anything about that since then?

A. If they were going to pull a gun?

Q. Or had a gun or threatened with a gun.

A. No.

Q. Now, as a part of your training are you taught that someone's apparent intentions with a gun are easier for you to make a judgment call on than their use of an automobile? Are you taught that?

A. I don't believe so, no, sir.

Q. Were you taught as a part of your training with the West Memphis Police Department that someone's [189] intentions – even perhaps in a pursuit situation their intentions with a vehicle is ambiguous and you really can't tell what they're intending? Were you ever taught that?

A. No, sir.

Q. Did you hold a belief on this night that someone's actions in a heated situation like this in

driving a vehicle could be ambiguous and hard to interpret what they're intending to do?

MR. MOSLEY: Object to the form of the question.

BY MR. SMITH:

Q. Did you believe that that night?

A. No, sir, I knew what he was doing with that vehicle.

Q. You knew?

A. I know. My – what I saw is what I believe.

Q. Okay. So you felt like you knew what was in his mind and what he was intending to do with that vehicle?

A. From what I saw.

MR. MOSLEY: Objection.

THE WITNESS: I'm sorry.

[190] BY MR. SMITH:

Q. You were in your car that night, you never got out of your car, you told us very clearly what your intent was, and that was to back up and get around behind him and block him. But had you been out of your car, would you have shot him?

A. Given the same —

Q. (Interposing.) Given exactly what happened that night, would you have shot him?

A. Given what happened that night, what I know, yes – if I had the opportunity to, had a clear line of sight and had the opportunity to stop that threat, I would have shot him.

Q. And that would have been consistent with your training by the West Memphis Police Department?

A. And through ALETA, yes.

Q. ALETA being what?

A. Arkansas Law Enforcement Training Academy.

Q. Would you have shot her that night?

A. If she posed a threat to me, if she was attempting to cause serious physical injury to me or somebody else or trying to kill me or somebody else, then yes.

Q. Well, I'm trying to ask that question – [191] and, frankly, I didn't do a very good job of it. So I'll try to improve.

Based on what actually happened out there that night, did you see her do anything that would have led you to shoot her?

A. No.

Q. Do you know when she was shot?

A. No.

MR. MOSLEY: Object to the form of the question.

BY MR. SMITH:

Q. Do you know who shot her?

MR. MOSLEY: Object to the form of the question.

THE WITNESS: No.

BY MR. SMITH:

Q. Now, in your training what were you taught about the reaction of the pursued in a chase? What are you taught about what their mindset is when a chase is going on?

A. You're taught – I don't know if even taught, but you're – discussion of it that they're trying to get away from you.

Q. Okay. Are you taught anything about how [192] they're reacting? I mean, clearly they're trying to get away from you, they're not stopping. But are they under a lot of anxiety and stress?

A. Sure.

Q. Is that part of what you're trained?

A. Sure, yes, sir.

Q. Are you trained that sometimes their decision making is not the best under that stress?

A. Yes, sir.

Q. Did you ever receive as a part of your training any indication of what normally happens to the person fleeing when pursuit is stopped?

MR. MOSLEY: Object to the form of the question.

Answer.

THE WITNESS: I can't answer that question. I don't know.

BY MR. SMITH:

Q. Did you ever receive any training on that?

A. I can't remember. I don't know.

Q. Well, let me – and I'm not trying to do violence to that answer, but I do want to make sure I fully explore this with you. For instance, in your training did anyone ever instruct you in exercising [193] your judgment as you're required to do throughout the pursuit to weigh the risk being created for safety issues versus the offense that's been committed, you need to understand what would happen if you choose to terminate –

MR. MOSLEY: (Interposing.) Object to the form of the question.

BY MR. SMITH:

Q. (Continuing.) – because we know typically what the fleeing person does when they know that you've terminated. Did anybody ever teach you that?

MR. MOSLEY: Object to the form of the question.

Answer.

THE WITNESS: I don't believe so, no, sir.

BY MR. SMITH:

Q. Sitting here today do you have – and I think based on what you told me, the answer to this is no; but I want to make sure. Sitting here today through any source do you have any appreciation of how soon after the termination of pursuit that the fleeing person typically stops or slows down or no longer constitutes any type of safety threat on the roadway?

[194] A. No, sir.

MR. HANSOM: Objection, form.

BY MR. SMITH:

Q. Now, how much training did you get on pursuits with the West Memphis Police Department?

MR. MOSLEY: I'll object to the form of the question. This was asked and answered.

MR. SMITH: Well, not in the way that I'm – I think I'm going to take this one step further than

what I did before; but you're right, you may be right on this one. You've been wrong before, but –

MR. MOSLEY: (Interposing.) I'm usually wrong, Gary, but one out of ten times I'm right; and, boy, do I let you know it when I am.

MR. SMITH: That's okay. That's fair.

BY MR. SMITH:

Q. Do you know, for instance, how many hours or days of training you had on pursuits?

A. Are we talking about pursuit driving or [195] the – what effect officers and suspects feel during the pursuit?

Q. Let's do it both ways. You give me both. Would it be fair to say that most of your training in this regard was on driving during pursuits?

A. Yes, sir.

Q. So break it down for me both ways as best you can the amount of time that was spent with each subject.

A. Pursuit driving, seventy hours of pursuit driving, same amount of time as pursuit – that's emergency driving, pursuit driving, about seventy hours. As far as instructor side of it, about seventy hours as being a pursuit emergency driving instructor. So you're talking a hundred and forty hours of actual class time and another seventy hours of actual

instructing time. So you're talking about two hundred ten hours.

Q. That may have told me something, but I missed. How much of that is actual driving, how to drive under these situations, versus here is how people react, here is how you exercise your judgment?

A. How much driving time?

Q. Yes.

* * *

[198] they're likely to react in certain situations as well as the officers.

Now, how much time was spent on that?

A. You're talking about, if any, couple of hours of human effects of a pursuit.

Q. Well, are you telling us there may not have been any?

A. I can't actually remember a class I sat down – an actual legitimate class that I sat down and we talked about human effects during a pursuit. I can't think of one.

Q. Was there any of that done here?

A. I can't think of one.

MR. SMITH: Okay. I want – Phil has just asked me about authenticating this, and I think we agreed off the record that Exhibits 1 and 2 are the

policies and procedures that you furnished to us and the ones that were in effect at the time?

MR. MOSLEY: I think he authenticated it through his testimony.

MR. SMITH: Well, but you're agreeing that that's what those are?

* * *

DEPOSITION OF VANCE PLUMOFF [sic]

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, by and through her mother SAMANTHA RICKARD as Parent and Next Friend,

Plaintiff,

vs. No. 05-2585DV

CITY OF WEST MEMPHIS, ARKANSAS, OFFICER VANCE PLUMOFF [sic], Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER TONY [sic] GALTELLI, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JOHN GARDNER, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER LANCE ELLIS, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JIMMY

EVANS, Individually and in his official capacity as an officer of the West Memphis Police Department, OFFICER JOSEPH FORTHAM [sic], Individually and in his official capacity as an officer of the West Memphis Police Department, and CHIEF ROBERT PAUDERT, Individually and in his official capacity as Chief of the West Memphis Police Department,

Defendants.

DEPOSITION OF VANCE PLUMOFF [sic]
August 5, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ESTATE OF KELLY A. ALLEN, Deceased, CLAYTON DAVID ALLEN, MARIA NICOLE ALLEN, A Minor by Next Friend, Kenneth B. Allen, ALEXIS LANE ALLEN, A Minor by Next Friend, Kenneth B. Allen

Plaintiffs,

vs. No. 05-2489MaV

CITY OF WEST MEMPHIS, MAYOR WILLIAM H. JOHNSON, CITY OF WEST

MEMPHIS POLICE DEPARTMENT, ROBERT PAUDERT, in His Personal and Official Capacity as Chief of the West Memphis Police Department, OFFICER VANCE PLUMHOFF, in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER JOHN BRYAN GARDNER, in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER TONY [sic] GALTELLI, in his personal and official capacity as a police officer of the West Memphis Police Department, and ANY OTHER UNNAMED OFFICERS OF THE WEST MEMPHIS POLICE DEPARTMENT, in their personal and official capacities,

Defendants.

DEPOSITION OF VANCE PLUMOFF [sic]
August 5, 2009

* * *

[7] Tennessee Air National Guard and Marion Fire Department.

Q. What do you do in your spare time?

A. Play with my son.

Q. How long have you been with the Police Department?

A. Since June of 1997, little over twelve years.

Q. Is that your only law enforcement experience, or have you had other?

A. I had four years of military police experience before I hired in with West Memphis.

Q. What is your rank in West Memphis?

A. Lieutenant.

Q. And when did you get that rank?

A. Just recently.

Q. When these events that we're here to talk about occurred, July of '04, what was your rank?

A. Sergeant.

Q. Is lieutenant the next step up, or is there one in between?

A. That's correct, there is nothing in between.

Q. What is your rank in the Air National

* * *

[15] Q. Correct?

A. That's correct.

Q. When you reviewed it, did you determine whether either yourself or any of the other officers

that night violated any of the provisions of that pursuit policy?

A. I did not see any, no.

Q. Did you – did you analyze it for that purpose?

A. Yes.

Q. Did you do any type of report as a result of that analysis?

A. No I did not.

Q. When you reviewed the deadly force policy did you determine that either yourself or any of the other officers violated any part of that policy and procedure?

A. I don't believe so. I don't think we did, no.

Q. Okay. Well, it's not going to shock you to know that I'm going to ask you some questions about that today.

A. Right.

Q. So we'll spend a little time exploring [16] that. As you heard yesterday, if I ask you anything that's unclear to you for any reason at all, tell me that instead of answering the question; and I'll clarify the question for you before you answer. I want you to make sure you know what you're answering. Will you do that?

A. Yes, sir.

Q. And if you need a break at any time, let us know, you get a break.

A. Okay.

Q. Fair enough?

A. That's fair.

Q. I take it you were working that night?

A. Yes.

Q. You had been an officer then for, what, seven or eight years?

A. Just short of seven years at that point.

Q. Okay. Now, you indicated that your only prior police experience was four years in the military police. Either in the military or even up to now in your tenure at West Memphis, have you ever been professionally disciplined?

A. I received – in the military I received a letter of counseling for having green socks instead of [17] black socks in my mobility bag; and in the Police Department I received a written verbal reprimand I believe is how Inspector West put it for failing to turn in a vacation slip when I the same day returned from vacation; but other than that I've never been disciplined.

Q. And you were not disciplined as a result of this incident?

A. No. There was one other incident in the military. I got a letter of reprimand for failing to render proper military customs and courtesies to a four star general; but other than that, that was it.

Q. Okay. You were on duty on the night of the 18th?

A. Uh-huh (affirmative), yes, sir.

Q. We think we established yesterday that this event occurred after midnight instead of what that first tape showed as being before midnight. Is that consistent with your recollection?

A. Yes.

Q. Now, your unit, as I understand it, did not have video on it?

A. That's correct.

Q. Were you on the State program that night

* * *

[19] You're looking for seatbelt violations, at that time after traffic stops. I'm assuming now that the State law has changed, you could look for that as primary stop; but you're looking for that and the DWIs are the two things that the program really wanted you to focus on.

Q. Where were you when you first became aware of the pursuit?

A. On Martin Luther King Drive.

Q. Where in relation to Southland Drive?

A. I was south of it. I was – when I heard the first broadcast, I was in front of probably right at Petro Road and MLK.

Q. You were pretty close, weren't you?

A. Yes, sir.

Q. As you noticed on the video yesterday, it appears your car is on and in the pursuit just very, very quickly?

A. Yes, sir.

Q. And at that point did you become primary?

A. Yes, almost immediately – well, yes, immediately, after – as soon as I saw the car.

Q. Did you have authority to terminate the pursuit?

[20] A. Yes.

Q. Did you have authority to terminate the pursuit at all times?

A. When I was primary unit, yes. After that I would have to say Lieutenant Fortham [sic] would have say over me since he did outrank me.

Q. Well, that may be a little bit different – may not be, may be a little bit different than what I wanted to learn from you.

A. Okay.

Q. Lieutenant Fortham [sic] may have outranked you, but did you – first of all, when you were primary, you clearly had authority to terminate; did you not?

A. Yes, sir.

Q. Even when you were no longer primary and even with Lieutenant Fortham [sic] also being in the pursuit, as a sergeant, did you have authority to terminate?

A. I don't know if the policy's necessarily clear on that. As a supervisor I would have to say yes. I don't think the policy goes into whether if there was two supervisors whether both had authority just the higher ranking. I don't recall whether policy stated that or not; but I do know a supervisor and the primary unit have that authority.

[21] Q. Did you that night through the entirety of the pursuit consider yourself to have the authority to terminate the pursuit –

A. (Interposing.) That night, yes, I would have felt that way.

Q. Okay. I didn't quite get finished with the question.

A. Sorry.

Q. That's okay, that's okay. We'll probably both do that before the day is over.

Did you consider yourself to have the authority to terminate during the entirety of that pursuit that

night? In other words, was there any point where you felt like, okay, I'm no longer in control of the decision of whether or not to terminate?

A. I would have felt comfortable throughout that pursuit making that decision that night if I needed to.

Q. Now, I take it that you know as a pursuit like this is taking place that the primary officer may change as the pursuit changes and, in fact, in this case did?

A. Yes.

Q. You became primary when you were closest, [22] and then Officer Evans became primary and you were no longer primary, that sort of thing?

A. Yes, that's common.

Q. Okay. When you were no longer primary because Officer Evans had gotten in front of you, did you still feel at that point, well, I know I'm not primary and I know I've got Lieutenant Fortham [sic] back here, so I'm out of the loop on the decision making process? Did that ever occur to you?

A. No. I never – I never felt that way during the chase.

Q. If at the point where you were no longer primary and you know you've got Lieutenant Fortham [sic] in the chase you had been asked whether or not to terminate, would you have deferred on that, or would you have answered that?

A. I would have answered.

Q. And you did in this case, didn't you?

A. Yes, sir.

Q. Who asked you about terminating?

A. Officer Evans.

Q. And was that in Arkansas or Tennessee?

A. That was in Tennessee.

Q. And did you instruct him not to terminate?

[23] A. That's correct. I told him not to terminate.

Q. And that was shortly before the – I forgot what Lieutenant Fortham [sic] called it yesterday. It says on the tape you wrecked out?

A. Yes, sir.

Q. There at Jackson and Danny Thomas?

A. Yes, yes, sir.

Q. Did anyone countermand your instruction not to terminate?

A. No.

Q. Had anyone inquired about the propriety of terminating prior to that time?

A. I did not see any point during that pursuit where – I don't believe that I ever considered – felt it necessary to terminate that pursuit during that time.

Q. My question was did anyone inquire about whether or not to terminate before that one that we just talked about?

A. Oh. No, no, that was the only time.

Q. When you first heard the call, what did you hear?

A. At the beginning of it you're referring [24] to?

Q. Yes, sir.

A. I heard Officer Fortham [sic] say he had one running, which I assumed meant he was in a pursuit; and that was the first that I was aware of it.

Q. Now, were you aware at that point of what led to that pursuit, in other words, what had gone on before then?

A. I knew Officer Fortham [sic] had made a traffic stop. Beyond that I had no knowledge of what had gone on.

Q. And how did you know he had made a traffic stop?

A. I heard him broadcast that he was making a traffic stop. I think he said at the Diamond Shamrock.

Q. Did he say what he has making the traffic stop for, what offense?

A. I don't believe so.

Q. When he broadcast that he had one running, did he indicate what the offense was at that point that he had stopped the person for?

A. No, sir,

Q. At any point during the pursuit did he or anyone else indicate what the offense was that had led [25] to the Rickard vehicle being stopped?

A. No, sir.

Q. So as you're in the pursuit, all you know is that there was a traffic stop, you don't know any more than that?

A. That's correct.

Q. As far as you knew, it could have been a traffic stop, as it was, for a busted headlight – or, excuse me, a headlight that was not working or it could have been for something else and then he gets up there to the car and sees something really bad, something far worse, drugs, guns, whatever? You didn't know the difference?

A. Correct. Anything was possible at that point.

Q. Did you make any inquiry during the pursuit of what has this guy done?

A. No. I never really had time and also the fact that, you know, Lieutenant Fortham [sic] was – outranked me and had initiated the pursuit.

Q. So tell me what that meant to you. Did the fact that Lieutenant Fortham [sic] initiated the suit –

MR. CAMPBELL: (Interposing.)

Pursuit.

[26] MR. SMITH: What did I say?

MR. CAMPBELL: Suit.

MR. SMITH: I didn't mean to.

Let me start over.

BY MR. SMITH:

Q. Did the fact that Lieutenant Fortham [sic] initiated the pursuit in and of itself tell you this pursuit is okay, that's all I need to know?

A. That might be a little bit of a simplification; but essentially, yes, since he was a lieutenant, I felt comfortable with his judgment of that.

Q. In other words, you felt that a lieutenant would know when it was appropriate to pursue and when it was not?

A. In general, yes; and also the fact that worked with Lieutenant Fortham [sic] for a number of years and I've seen how he works, and I have confidence in his judgment.

Q. Well, again, that was just part of your reliance on if he started it, you assumed it was okay?

A. Yes, sir.

Q. In the policies and procedures about when to pursue and when not to pursue, does it give [27] accommodation to officers using their judgment?

A. Yes.

Q. Does it give some guidelines for the officers to follow?

A. Yes.

Q. Does it include that you in a pursuit need to make a judgment as to whether the seriousness of the offense for which the person had been stopped was worth the risk created by a high speed pursuit? Is that part of the judgment process that you're supposed to go through?

A. That is part of it, yes.

Q. Now, how did you view that requirement of the exercise of judgment on your part? In other words, would you as an officer operating under that policy and procedure consider it in terms of whether or not to pursue someone the same if they had shot someone or committed a violent felony as you would for someone who was stopped for a headlight being out? Would that make any difference to you?

A. Of course, yes.

Q. And what would that difference be?

A. The more serious the offense, the – you know, the greater the need to apprehend the violator as [28] opposed to the risk.

Q. Do you agree that high speed pursuit creates risk?

A. Yes.

Q. Risk to everybody involved and to those who are not involved?

A. Yes.

Q. Those not being involved being civilians?

A. Yes.

Q. Do you agree not only from your knowledge of what went on that night, but from looking at these tapes more recently, civilians were at risk that night?

A. Yes, that's probably a fair statement.

Q. If in the initial part of that pursuit you knew that all this guy had done was drive his car with a headlight out, would that have altered your thinking as to whether or not the pursuit was justifiable given the risk that was involved?

MR. HANSOM: Objection to form.

BY MR. SMITH:

Q. You may answer.

A. At that time of night with the traffic conditions that I personally was seeing, I would have initiated the pursuit the same way.

[29] Q. With a headlight out?

A. With the headlight out and – are we speaking of what I knew at the time or what I know now versus after seeing the tape?

Q. That whole question was predicated on if you had known. So I want you for purposes of this question to assume that you knew – and I know you didn't.

A. Right.

Q. But if you had known that this was all over him driving with a headlight out, would that have altered your thought process and your judgment as to whether this pursuit was worth the risk that it was creating?

MR. HANSOM: Objection to form.

THE WITNESS: Go ahead and answer?

BY MR. SMITH:

Q. Yes.

MR. HANSOM: Yes.

THE WITNESS: The headlight out, not necessarily. However, with what he observed with the windshield, with the glass sprinkle still on the

dashboard, and [30] the nervousness of the driver, yes, I absolutely would have taken the same action.

BY MR. SMITH:

Q. Well, let's break that down a little bit. Let's start with just fact that the headlight was out. Now, that's – you know now that's the only reason he stopped him?

A. Initially yes.

Q. Yes. Now, if – then if you knew, as I understand you – and you correct me if I'm wrong. If that's all it was, that you're told, hey, this guy is running and he's got a headlight out, you would have thought the risk outweighed the need for pursuit, wouldn't you, if that's all it was?

A. I'm not sure. It's kind of hard to say without being in those shoes; but, you know, in this case it – it wasn't just a headlight. I mean, it was the other things as well. I don't know. That's hard for me to say, whether I would have gone for just a headlight or not.

Q. I'm not sure that you didn't deviate a little bit in the middle of that answer off the question. Perhaps you didn't, but let's make sure [31] we're on the same question and answer.

A. Okay.

Q. And what you may have been talking about was simply because you didn't know it, I don't know, so let's clarify. Assume for me that it was true that night that you hear about the pursuit and

immediately you learn this guy was stopped because he had a headlight out and he ran.

Now, because of the risk that it creates to everybody involved as well as the civilians, your judgment at that point, if that was all there was to it, would have been not to get in a pursuit and create the risk; isn't that fair?

A. If I hadn't seen any signs of – like if I had initially stopped him and they just ran where I didn't observe anything else other than that headlight, I probably would have terminated.

Q. Okay. Now, the other factors that you talked about a moment ago, about the broken windshield and his nervousness, were things that you have since learned that the lieutenant says he observed that night, correct?

A. That's correct.

Q. Okay. Now, you were here yesterday and [32] heard him testify that people being pulled over, it is not at all unusual for them to be nervous. In fact, he said he's still nervous when he gets pulled over. That's normal, isn't it?

A. Certain degree of nervousness, sure.

Q. You didn't have a chance to see then and you really don't know now the degree of nervousness that Mr. Rickard displayed, do you?

A. There was a couple of things on the tape actually that did stick out in my mind.

Q. What was that?

A. First initially when he stops him before Lieutenant Fortham [sic] even gets out of his vehicle, he's back out the window yelling that he knows he's got a headlight out and things like that. In my experience at that time and since, that's usually led to the discovery of something else wrong. They're trying to keep you away from their vehicle. It's kind of a defensive – defensive thing; and most people, if it's just a routine traffic violation, don't do that. I mean, that's pretty unusual to see that.

Q. Now, are you telling me –

MR. MOSLEY: (Interposing.)

Wait. He said two things. He had not

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[38] Q. During the time particularly where you're primary – and, by the way, were you primary all the way up to the state line, or did Officer Evans take over somewhere in there?

A. He did get in front of me before the state line. I may have passed him up again after that. I couldn't say for sure. I don't remember the exact – the exact flow; but I do know that for the initial part of the pursuit at least I was the primary, but I don't – and I know before the state line at least once Evans got in front of me, but I don't know if I got in front of him again after that or not.

Q. At any point in there did I know you said that the lieutenant did not say what the offense was that Rickard had been stopped for. Did you or any of the other officers ever inquire what it was?

A. I know I did not, and I did not hear anybody else.

Q. How far is it from the time that you get on 40 until you get to the weigh station?

A. Once again, I can't give you an exact answer. Maybe one or two miles. I could be incorrect on that.

Q. Well, it's further to the state line than [39] it is to the weigh station, we can agree on that?

A. Yes.

Q. Okay. Did you have it in your mind before that circumstance that we hear on the tape – and, by the way, we're going to get to the tape later where you say he tried to ram me, it's a felony, words to that effect, something like that. We'll hear it, whatever it was that was said.

But up until that happens were you considering that this was a pursuit on a misdemeanor that would be terminated if it got to the state line?

A. At that time I thought if it was a misdemeanor, I was under the assumption that Lieutenant Fortham [sic] would call us off somewhere in that – before we crossed into Tennessee.

Q. And you heard his testimony in that regard yesterday, that it was – the pursuit would have been terminated but for what y'all considered to be the vehicular assault at the state line?

A. Right. That's – yes, that's what he said yesterday.

Q. And my question right now is – and perhaps you answered it, but I want to make sure. Were you operating under the assumption that it was a [40] misdemeanor since he had not told you what the offense was and that it would be terminated at the state line?

A. No. I didn't know whether it was a misdemeanor or a felony. I just – you know, knowing Lieutenant Fortham [sic], I was confident that if it was a misdemeanor that he was going call us off at the state line.

Q. Now, at any point did you ever talk about involving Memphis?

A. Not myself, no. I –

Q. (Interposing.) Did somebody else?

A. Yes.

Q. Who was it?

A. Lieutenant Fortham [sic] said to notify Memphis.

Q. And when was that?

A. I believe it was right after I said he just tried to ram me. I don't – I know it was pretty close after that.

Q. Okay. Now, I want to talk about that a little bit. Have you reviewed all the tapes?

A. Yes.

Q. I think there are three.

A. Yes.

Q. Do any of them show that event?

[41] A. The – Lieutenant Fortham's [sic] tape shows where it happened, when it occurred. The yellow strobe on my vehicle pretty well washes out the detail.

Q. So let me ask the same question but a little bit differently. Can you see the event on any of those tapes?

A. Not well.

Q. Okay. Well, can you see it at all? I mean, can you see the action that the Rickard vehicle took that you described as whatever it was, he tried to ram me, tried to hit me or whatever? Can you see his car in relationship to your car and the conduct that led to your characterization?

A. You can see the vehicle come over to the right; but, as I said, with that yellow strobe, it's hard

from the video to determine the exact proximity from the video.

Q. Now, did you ever get in front of his vehicle that night?

A. No.

Q. What was the closest you ever got to him?

A. I was – when that particular incident happened, I was beside him and probably three feet – you know, three feet back. The front of my bumper [42] probably would have been three feet back from the front of his bumper.

Q. And he moved over to the right?

A. Yes, sir.

Q. Did he hit you?

A. No.

Q. Did you hit him?

A. No. I managed to avoid him.

Q. And what did you do to avoid him?

A. I went over to the right on to the shoulder, and I also tapped my brakes slightly.

Q. Does that show up on the video?

A. You can see the motion to the right. Once again, it's unclear exactly how far over on to the shoulder I was with that yellow strobe.

Q. Can you see your brake lights come on?

A. I don't remember on the video whether you can or not.

Q. Okay. Well, we'll look at that in a little bit. Did you consider the movement of the Rickard vehicle at that time to be a safe maneuver?

A. No.

Q. What was the speed at that point?

A. Be hard for me to say exactly. If I had [43] to – it was in excess of seventy-five at that point I would say, but past that I really couldn't give you a better estimate.

Q. What's the highest speed you ever reached that night, you yourself?

A. I don't know exactly what the highest speed we ever reached. I know at one point I did see – I glanced down at my speedometer at one point. I saw I think like a hundred two, a hundred four, something like that.

Q. Where was that?

A. That was after that particular – after I said he tried to ram me. It was – I can't tell you exactly, but it was at some point between that and the DeSoto bridge.

Q. Did you ever get up to a hundred twenty-four?

A. I don't know. I didn't – I never looked down when – and saw that speed on the speedometer. The hundred four is the fastest I saw. We might have gotten faster than that. I'm not sure.

Q. You never told anybody you got up to a one twenty-four?

A. I don't believe so. I do know I told [44] Detective McDougal that we got up to over a hundred in that statement, but the highest speed I saw on my speedometer was a hundred four.

Q. Are those cars black box equipped?

A. I'm not sure what year that is or what year they mandated that. They could be. I'm not sure.

Q. Do you know whether there was any information downloaded?

A. I don't know if there was. I don't believe there was. I never saw anybody do that.

Q. So what did you do when you say he came over on you to the right other than you moved to the right and you said you tapped your brakes? Did you do anything else in response to that move?

A. I – well, when I tapped the brakes, I dropped back behind him a little bit.

Q. How far did you move to the right?

A. Over on to the shoulder as far as I could. I was – had some concern about hitting the – I don't

remember right there whether it's a guardrail or retaining wall, but either way I knew I had a – there was a solid barrier there, and I was concerned about getting caught in between.

Q. How wide is that shoulder?

* * *

[53] A. I don't know if I would say it went up substantially, but I would say it increased the risk, yes.

Q. I mean, in fairness, I think you would acknowledge that any time you're in a high speed pursuit like that and on a traveled roadway like I-40, there is always substantial risk?

A. Yes, yes.

Q. So when that event happens, you considered that to some extent that risk has been elevated. And I'm assuming at that moment when you say you tapped your brakes, moved over to the right, and allowed yourself to fall behind, he's on up in front of you again?

A. Yes.

Q. So take me from there, what you saw next.

A. Almost immediately he went over to the left towards Officer Evans' vehicle, and from where I was at I know Officer Evans had to drop back and he like shimmied or fishtailed, his vehicle kind of shook some

like it was – I won't say out of control, but on the verge of it.

Q. Whose?

A. Officer Evans.

[54] Q. So let's talk first about the movement to the left. What lane was Officer Evans in?

A. I believe he was in the inside lane,

Q. Closest to the median?

A. Correct.

Q. At that point is the median a barricade?

A. Yes. It's – I believe it's concrete Jersey barrier.

Q. Do you know what the width of the shoulder is at that point?

A. No, sir, I don't.

Q. It's not a traffic lane, is it?

A. No, sir.

Q. Agreed?

A. No, it's not a traffic lane.

Q. Now, when Rickard moved from the right-hand lane where he and you had been, how far was it time-wise to where you say he and Officer Evans have their encounter?

A. Almost immediately he – from one lane right all the way across.

Q. Now, that means he had to cross, in essence, three lanes of traffic. There are three lanes of traffic at that point; am I right?

[55] A. I believe. I believe so, yes.

Q. So you're saying he moved from the far right immediately to the far left?

A. Yes, sir, just immediately right after that.

Q. He didn't make any stop, if you will, and I don't mean literally the vehicle stop, but he didn't – there was no period of time where he was driving within the center lane?

A. No.

Q. He just crossed it?

A. Yes, sir.

Q. Now, describe for me as best you can the angle at which he crossed those lanes of traffic.

A. I really couldn't tell you. I was – I couldn't tell you the specific angle, sir.

Q. When he got into the far left-hand lane, how far was he in front of Officer Evans?

A. He came over actually next to Officer Evans. Officer Evans had to drop back.

Q. Well, did he hit him?

A. I don't believe he did. I didn't see any contact between the vehicles.

Q. So with the movement that he was making

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[56] across that lane, if he had continued in it and Officer Evans had continued, would they have collided?

A. Yes, sir.

Q. Does the video demonstrate that?

A. I'm not sure. I'd have to see it again.

Q. Have you looked at the video for purposes of verifying what you thought you saw that night?

A. Yes, sir.

Q. And when you looked at it to verify whether or not contact would have been made but for Officer Evans' evasive action, were you able to verify what you thought you saw that night?

A. In my opinion, yes.

Q. Okay. We'll look at it. I keep telling you we're going to look at it. I promise you we are.

Now, at that point Mr. Rickard is in the left-hand lane. Before he gets to the state line, did he ever change lanes again?

A. Several times.

Q. And was that as he would encounter traffic, he would maneuver through them?

A. Sometimes yes, and sometimes – again, on the bridge I tried to get him – get around him again, and he moved over towards me again to the left that [57] time. I believe at that moment I was in the inside lane and he was in the center lane when he – at that time I hadn't gotten as far up next to him. It was probably – my front wheel would have been about even with his back wheel; and he came over to the left, and I had to drop back again.

Q. Did you announce that one?

A. I believe I did, yes.

Q. So when we get on the tape, point that out for me.

A. Yes, sir.

Q. Okay. I'll try to remind you, but help remind me as well.

As you come on across – well, is it fair to say that the entirety of the time y'all were on 40, you're encountering traffic? You can tell that from the video; can you not?

A. Yes, it was heavier at first, There was a stretch between the scales and the bridge where there was – actually right up until Danny Thomas where there was really very little traffic; but there was at least some pretty much the entire time.

Q. When he is approaching Danny Thomas, what lane was he in?

[58] A. I believe he was in the far right lane.

Q. What lane were you in?

A. I think it's four lanes there. I don't recall exactly. I was not in the far right lane, but I – I don't remember whether I was in the next one or the third one over from the right.

Q. Was anybody in the right-hand lane?

A. I'm not positive. I think there was, but I'm not positive.

Q. Were you expecting him to turn on to Danny Thomas?

A. No.

Q. Did you think he was going to go past Danny Thomas?

A. That's what I thought at the time, yes.

Q. Who was the first one behind him up the ramp?

A. I believe it was Officer Evans.

Q. Who was second?

A. I'm not certain if it was me or if I was third. At that point I was either second or third, but I don't remember if I was – I don't remember if I was the second one or not at that point.

Q. Did you have to negotiate any civilian [59] cars to make your unexpected turn on to Danny Thomas?

A. Yes. There was a pickup truck pulling a boat trailer.

Q. Tell me about that.

A. It was just – it was in the lane, and I had to step on my brakes pretty hard to drop back behind him and make the turn over on to Danny Thomas.

Q. What lane was he in?

MR. HANSOM: When you say "he"?

BY MR. SMITH:

Q. The pickup with the boat.

A. It would have been either the immediate right lane or the second one, whichever one was to the right of me. I don't recall exactly which lane that I was in at that point.

Q. He makes the Danny Thomas ramp, comes on around to Danny Thomas, and goes north back up over the interstate, goes to Jackson or Parkway where it converges, takes a right, spins out into that parking lot, if you will, where all of this ultimately takes place; is that accurate?

A. He – when he came off the ramp, he actually went to I believe – I think it's called Alabama Street, because when you come off the ramp, it [60] splits.

You can either go right on to Danny Thomas or straight up to Alabama; and he went right on Alabama and then right again on Danny Thomas, but he didn't actually follow the curving ramp up on to Danny Thomas.

Q. But then he comes back up over the interstate, makes the right-hand turn, spins out?

A. Yes.

Q. Now, at that point how many cars converge? I'm talking about when he, as it says on the tape, wrecks out?

A. At the time I knew of at least four; and at that time I was under the impression it was more, but I knew there was at least four.

Q. Okay. Identify those for me, please.

A. I know there was myself, Officer Evans, Lieutenant Fortham [sic]. I knew there was at least one or two other cars at that point. I don't think I knew who was driving them at that point.

Q. And as the cars converge on him in that parking lot, which number are you in order?

A. At that point I was third in the pursuit; but when he spun out into the parking lot, it – there really wasn't an order at that point, because people were turning into the parking lot.

[61] Q. What was the objective at that point?

A. To try and box him in where he couldn't continue to flee.

Q. And what did you do to accommodate that?

A. I tried to get in front of him and cut his vehicle off.

Q. Did anybody else get in front of him to cut him off?

A. There were other vehicles in front of him. At the time I didn't know who they were, but there was vehicles converging from multiple angles.

Q. And he's blocked by the building on his left, correct?

A. At that point the building would have been – yes, yes, yes, sir, that would have been to his left.

Q. At least you've got him blocked from the front?

A. If – it all happened pretty fast, but there was – it wouldn't have taken much of a turn to get around me.

Q. Well, don't you have somebody to your right?

A. There was somebody coming in from the

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[63] left and behind me. There was one car sort of in front of me and to the left.

Q. Was it Evans?

A. I know that now. At the time I did not.

Q. Okay. Evans was immediately to your left, and then Fortham [sic] further over to the left?

A. Not further over to the left. He was more behind me than to the left I believe.

Q. Okay. Is it fair to say that when all those cars are in there, he's not going to come out forward, he's got no room to come out forward?

A. I wouldn't – that night – I mean, looking at the videotapes now I would say yes, but that night it was pretty much up in the air which way he was going to come out.

Q. Okay. Well, it's fair enough to answer the question the way you did. What you know now is he didn't have a route out of there coming forward, you know that now looking at the tapes?

A. Not unless he was able to push a car out of the way or something like that.

Q. Okay. His only route out was backwards?

A. I believe so, yes.

Q. And by definition no one has blocked him [64] from the rear?

A. That night I really didn't know exactly where all he was blocked from, because it was all going on just really fast.

Q. Well, you know now he wasn't blocked from the rear?

A. Yes.

Q. So my next question about that is was that a conscious decision that y'all made, or was that just kind of the way it worked out?

A. Just the way it worked out.

Q. Okay. If – if y'all had done it the way you would have preferred to have done it, would you have had people surrounding him from every angle to where he could not escape?

A. That would have been the ideal solution, yes.

Q. Okay.

MR. HANSOM: Break time.

MR. SMITH: Take a break.

THE WITNESS: Yes, sir.

THE VIDEOGRAPHER: We're off the record at 11:01.

(Whereupon, a break was taken.)

[65] THE VIDEOGRAPHER: We're back on the record at 11:15.

BY MR. SMITH:

Q. Now, I want you to take me through what happened once he wrecks out. We before the break

discussed where everybody positions themselves, but I want you to go from that point and tell me what happens, how the events unfold.

A. It all happened pretty quick; and when I saw that he had spun into the parking lot, I was going to try to maneuver at least somewhere in front of him. So I made a right turn into the parking lot. He started to accelerate, and at that point he was not pointed directly at me, he was a little bit offset.

I don't really know how I can explain it to you. The right fender of his car would have been more pointed at me than the front of his car, it was kind of at an angle; and as I came into the parking lot, he started accelerating and turned towards me. I mean, it was almost straight lined up; and, I mean, it was quick.

And I stood on the brakes, and I think I told my ride-along hold on or we're going to get hit or something like that; and he accelerated and hit me up [66] straight head-on collision, and his vehicle started – mine I believe stopped right there, stopped dead, and his started I thought rolling backwards.

It was – I don't know whether it was rolling backwards or backing away from me. At the time I believed it was rolling backwards, because the collision was enough where I – at that time I believed my vehicle was disabled, and I was pretty certain his was disabled at that point. So I got out of my car –

Give me just a second.

Q. You got it. You take your time.

A. I got out of my car, and I looked at their car; and the female was bent forward. It looked like she was digging around on the floorboard; and so I drew my gun, and I ran up to their vehicle; and at this point I thought it was just rolling back from the collision, and it might have been. I don't know whether he was backing or just rolling back.

And I ran up to the car, and I knew I had vehicles and officers converging pretty much from all around me. I couldn't at that point have told you exactly who was where or what vehicle was where. I just knew I had cars to the left, to the right, behind me, and officers similarly pretty much all around me.

[67] And I ran up, and that night I believed I was standing directly in front of his wrecked front headlight and pointed my weapon into the car yelling, show me your hands, get out of the car, get out of the car, things of that nature.

And I heard the engine start to race and tires barking, squealing, whatever term you want to use, braking/traction, and it just kind of hit me all at once. It was like – like, oh, God; but I had my front sights pretty much lined up on his chest. I remember that part just as clear as a bell, and I just – it was like, oh, God, I'm about to get killed; and I squeezed.

I remember firing three rounds. I remember that just completely clearly. I had no doubt as to how many rounds I had fired; and I knew he was hit,

because he snapped over to the left and then immediately just sat right back up and looked, looked forward; and then he started to – and after my third round it kind of – it breaks down from that point. I kind of remember more freeze frames than a coherent picture of what happened.

And he backed out into the street, and I remember following kind of almost in an arc as he

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[78] A. It's velocity.

Q. What about velocity?

A. I'm not remembering exactly, but I want to say it has something to do with – not necessarily velocity, but the kinetic energy of an object related to its velocity. I may be off base on that, but that's the impression I had of what delta-V meant.

Q. You told me that after the impact the vehicle rolls back some and then at that point you get out of your vehicle?

A. Yes, sir.

Q. When you get out of your vehicle, do you immediately draw your weapon?

A. Very shortly thereafter.

Q. When you get out of your vehicle, how far are you from the Rickard vehicle?

A. It would be hard to say exactly. We were in close proximity.

Q. Just a few steps for you?

A. I know I had to run a few steps towards the vehicle. Once again, I can't tell you exactly. It all happened –

Q. (Interposing.) But it was close?

A. Yes.

[79] Q. And you went approximately around the right front headlight of the Rickard vehicle did I understand you to say?

A. Yes. At the time I actually believe I was directly in front of the right headlight.

Q. Were you a little bit off to the side of it per the video?

A. Per the video, yes, I was.

Q. Now, at the time that you fired the three shots, were you the only officer at the car?

A. I'm – I – at the time I was not certain. I knew I had some officers in close proximity. I did not know their exact positions around the car.

Q. When you got out of your car, was it your intention to shoot him?

A. No.

Q. Was it your intention not to have to shoot him?

A. I would – that would have been the way I wanted it to go, yes.

Q. You had your weapon drawn in case you needed to shoot him?

A. That's correct.

Q. Now, what was the event, then, that made [80] you decide to pull the trigger?

A. When I heard the engine start racing that the vehicle was going to get in motion and potentially run me or one of my guys over.

Q. Now, at that point he wasn't – I mean, irrespective of what you thought might happen, his only avenue of escape I think we've already determined was to the rear?

A. Are you asking me at that time or –

Q. (Interposing.) At that time.

A. At that time, no, I did not know. I did not know exactly –

Q. (Interposing.) I'm sorry. Okay. I'll accept that one answer, but I'm going to ask the question a little bit differently. We know, in point of fact, that was his only means of escape? Whether you realized it or not going backwards was his only way out?

MR. HANSOM: Object to the form.

THE WITNESS: That was the only clear way out. It would have been possible to ram or push a vehicle out of the way, but that was the only [81] unobstructed way out looking back at the video.

BY MR. SMITH:

Q. When you got out of the car and approached, was there anybody to the car before you, any officer?

A. I'm not certain. That night I – I was not aware if anybody was right up to the car before I was. I did know that several of us were close.

Q. Now, if anybody had been up to the car – I mean, your vision was not obstructed in any way, you could have seen them; could you not?

A. It just – it happened so fast and I was looking so many places, I mean, somebody could have got up there without me seeing them. I don't know.

Q. Well, I know you're saying you don't remember. But my question is based on the field of vision there, there was nothing to prevent you from seeing another officer if they were at the car?

A. There was no physical obstruction, no.

Q. Now, you said that you saw her – and I'm not sure whether you said reach in the floorboard or how you said it. Tell me again what you saw in that regard.

[82] A. She was leaned forward, and I could see like motion in the shoulders like she was – the

impression I had at the time like digging through something or trying to get something on the floorboard of the car; and that's the actual thing that prompted me to draw my weapon when I did, is seeing that, because I didn't know what she was reaching for.

Q. If that was your observation that night, was that the reason you shot?

A. No.

Q. So can we – can we leave here with the understanding that whatever it was she did is not what caused you to shoot?

A. That's correct.

Q. Further on that point, though, now that you have reviewed the video do you now see that someone else got to the car before you?

A. Yes.

Q. Who was that?

A. I believe it was Officer Evans.

Q. And is Officer Evans more or less right on top of her, though outside the car, banging on the window – windshield in front of her?

A. Looking at the videotape, yes.

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[86] Q. More than once?

A. Maybe. I couldn't tell you. I don't know.

Q. Was anyone else giving them commands?

A. I'm not certain. It – it was all happening really quick. I'm not certain.

Q. If I understood you correctly when you were taking us through this scenario, and please if my understanding is wrong, tell me, was that what led you to fire the weapon was you heard the rev of the engine and I think you said – I know you said the tires squealing, and I took those two together. Was I wrong about that?

A. No, they were pretty much –

Q. (Interposing.) Simultaneous?

A. Or near to it.

Q. Okay. Was it the combination of those events that put you in fear of your life so that you made the judgment to pull the trigger?

A. The combination of that and my proximity, and it – I was afraid really for all of us, myself primarily; but I also had concern for everybody around there.

Q. So how far – well, when he revs the [87] engine, he's squealing the tires, how far did his car move before you fired the first time?

A. I'm not sure.

Q. Your best estimate.

A. Not far. At the time – I know I perceived motion, but I can't tell you – looking back in my recollection of that time I – I perceived motion is about the best I could tell you. I can't tell you how far or anything like that.

Q. Did you perceive motion forward toward you or rearward away from you?

A. My impression was towards me.

Q. Looking back at the tape now, was your impression correct?

A. The vehicle – looking back at the tape, the vehicle was against the front of Officer Gardner's car at that point and he was trying to I guess – I can only guess his intention, but he appeared to be trying to push it with his vehicle looking at the tapes.

Q. Is that when you started shooting?

A. Yes.

Q. If his vehicle was against and actually touching Officer Gardner's car, was any individual person in its path?

[88] A. Directly – if it went directly forward, then – are you asking me my recollection now as far as that time?

Q. Yes, either way, either way.

A. At the time I really didn't know. I didn't know exactly where everybody was. I just knew that

there was several people ...se from different aspects of the car. Looking back at the video now, if he'd have gone straight forward, he would have been pushing Gardner's car, not –

Q. (Interposing.) Wouldn't have hit anybody?

A. I can't say that for sure. I mean, I don't know what would have happened if all that would have gone that way.

Q. Well, if he'd gone straight forward and pushed Gardner's car, he was not moving the car in the direction of any of the officers at that point, that's a true statement, isn't it?

A. I'm – even with the videos today I'm not absolutely certain, because I don't know who all was on video when.

Q. What was it when you heard the engine rev and the tires squeal that made you think you were going to get killed?

[89] A. I just – I just thought I was about to get run over. I don't really know how else I could put it than that.

Q. After all the turmoil of this was over, did you look at Officer Gardner's car that he was trying to push out of the way?

A. I don't think I ever did that night.

Q. Could you tell how hard he hit Officer Gardner's car?

A. No. Actually now that I'm thinking about it, the first time I – I think the first time I ever knew that he had been against Gardner's car was the first time I saw the videotapes months later. Yes, that night I never did know he hit Gardner's car.

Q. Now, when – when you made the decision to pull the trigger, did you do so with the recognition that it might result in death?

A. I pulled the trigger to stop the threat.

Q. Did you pull the trigger in recognition of the fact that it might result in death?

A. At the time the only thing I was thinking is I'm about to get killed, I – my intention was to stop that from happening. That was my intention.

Q. It was certainly your intention to hit the [90] target?

A. Yes.

Q. And he was the target?

A. Yes.

Q. You told me earlier, as I recall, that you reasonably believe – you know you hit him once, and you reasonably believe you hit him all three times?

A. Yes.

Q. And is that belief based on, one, your proximity to him and, two, your marksmanship?

A. I know I had a good sight picture on all three shots, and I just – I don't – it's not outside the possibility that I missed, because even expert marksmen on the range, when that happens, it's not even remotely close to the same thing. There is not even a comparison. So I believe I probably hit all three times, but it is entirely within the realm of possibility that I didn't.

Q. Okay. Now, when you went through in your detailed description of all these events from the time of the wreck-out to all the way down to hitting the house and the things that you did and the others did, the one thing that I do not believe that you included in that answer was the shots fired by others; and so I [91] want to ask you about that now.

Do you know how many others fired shots?

A. At the time I did not. I was actually – when Lieutenant Fortham [sic] started asking who fired their gun and I said I had and then Gardner said he had, I was actually surprised. I did not hear any other shorts fired during the whole incident.

Q. You did not know that anyone fired shots other than you?

A. That's correct.

Q. Now, when the car – the Rickard car backs out into the street, you know it does a circle sort of, does it not, a semicircle, a half moon?

A. Yes, sir.

Q. When it gets to the point where it stops in the street and then starts to go forward, where are you?

A. I was towards – I was offset to the right and towards the front of the vehicle.

Q. How close to the vehicle?

A. Within a few feet. I couldn't tell you, closer than that.

Q. But you're real close?

A. Yes.

[92] Q. Now, you've seen the video and the shot – other shots that were fired?

A. (Witness nods head affirmatively.)

Q. Have you counted, for instance, how many shots Officer Gardner fired?

A. After watching the video and since then, I know now that it was ten.

Q. How close were you to him when he fired those ten shots?

A. It had to have been within a matter of feet.

Q. Meaning?

A. Less than twenty feet, maybe less than that.

Q. And you're telling us that you had no knowledge that those shots were fired that night?

A. I never heard a single one of them.

Q. Do you know why?

A. The only thing I can guess is the adrenaline; and, like I said before, after I fired my three shots, everything from that point on until I got – had been down at the crash site for a little bit is little freeze frame images. The only thing I can say is the adrenaline and the surprise and how fast

* * *

[111] MR. SMITH: I want the pursuit. I don't need the stop.

THE VIDEOGRAPHER: Okay.

Give you some audio. Ready to roll?

MR. SMITH: Uh-huh (affirmative).

(Video playing.)

BY MR. SMITH:

Q. So that's you coming in now; is it not?

A. Yes, sir.

Q. Is that you?

You can tell us to stop when you see the first event with your car.

Is that you on the left?

A. Yes.

Q. Are you behind him at that point?

A. Yes, I am.

Q. I mean, is he in that lane?

A. Yes, he's in . . .

Q. Has he changed lanes at that point?

A. I believe he has. I'm not absolutely certain.

MR. SMITH: Stop, stop, back

* * *

[113] coming. Okay.

(Video playing.)

MR. MOSLEY: Do you want him to point to it when he's over the fog line?

MR. SMITH: That would be fine. I also want it to stop.

THE WITNESS: Right there.

MR. SMITH: All right. Stop.

(Video stopped.)

BY MR. SMITH:

Q. Now the car that's over the fog line, is that yours or his?

A. Mine.

Q. How long were you over the fog line?

A. I couldn't tell you exactly. Probably a few seconds.

Q. That's at 11:11:34?

A. Appears to be, sir, yes.

Q. Which we believe to be 12:11:34 actually?

A. Approximately,

MR. SMITH: Okay. Go ahead, Rob.

(Video playing.)

THE WITNESS: There.

[114] BY MR. SMITH:

Q. Can you see that one?

A. Uh-huh (affirmative).

MR. SMITH: All right. Back it up.

(Video stopped.)

THE WITNESS: I'm sorry. I should have said stop I guess.

(Video playing.)

THE WITNESS: There.

BY MR. SMITH:

Q. Stop.

A. Right there.

(Video stopped.)

MR. HANSOM: Note the time for the record.

BY MR. SMITH;

Q. 11:11:43. Now, is that you saying he tried to ram another car?

A. No, sir. That's Lieutenant Fortham [sic].

Q. Okay. Is that something that you observed that night yourself, or did you just hear the lieutenant say it?

A. I saw it. I was looking over to the left [115] at that time.

Q. Do you make an announcement that he tried to ram another car?

A. No, sir.

Q. Did he try to ram that car at that point?

A. That's the way it appeared to me, sir.

Q. Can you tell from that video what the proximity of those two cars are to each other at the point that the lieutenant says he tried to ram him?

A. Not precisely, no.

Q. Can you tell how far the lieutenant is from those vehicles?

A. No, sir.

Q. Do you know how far you were from him at that point?

A. Once again, not exactly. It was all happening pretty fast. I couldn't tell you exactly, sir.

Q. Well, are you somewhat behind him?

A. Somewhat – somewhat behind. I don't remember whether I was looking – I wasn't looking straight over to the side. It was forward and left is as precisely as I can tell you is where their position was from me.

[116] Q. Do you know your speed at that point?

A. No, sir.

Q. What other traffic was in proximity at that point, 11:11:43?

A. It was, if I remember right in looking at the video, one or two cars; but I can't tell you what their positions were.

Q. Are you coming up on some cars in your lane?

A. I'm not positive. I don't – I'd have to see more of the video past this to know for sure. I don't recall specifically one being there.

Q. All right.

MR. SMITH: Go ahead, Rob.

(Video playing.)

THE WITNESS: Right there –

(Video stopped.)

THE WITNESS: (Continuing.) – he came over to the left towards me. I was trying to get past him on the left side; and pretty much the same thing, I had to drop back a little bit. I didn't get as far up beside him on that occasion, and the video is really not useful here [117] for that, though.

MR. SMITH: Go ahead.

(Video playing.)

BY MR. SMITH:

Q. Yes, that was 11:12 and 40 seconds or so.

A. It's right here.

MR. SMITH: All right. Now stop.

(Video stopped.)

THE WITNESS: And for the next second or two when he's backing up is when I'm –

BY MR. SMITH:

Q. (Interposing.) Tell me what the significance of this is.

A. She's leaned forward, appears to be reaching for or digging around for something on the floorboard.

Q. And that's at 11:14:17? Can you see –

(Video playing.)

MR. SMITH: Hold it.

THE VIDEOGRAPHER: I'm sorry.

MR. SMITH: Just a second.

THE VIDEOGRAPHER: I'll go [118] back.

(Cuing [sic] video.)

MR. SMITH: All right. Now, stop right there.

(Video stopped.)

BY MR. SMITH:

Q. All right. Now, at that point has he hit your car?

A. Yes.

MR. SMITH: All right. Then let's back up, Rob.

BY MR. SMITH:

Q. I want you to tell me – does the impact with your car show on the video?

A. I don't believe it does on this one.

Q. I want you to try to tell me as best you can when it happens.

MR. SMITH: So back up, Rob, just a little bit.

(Cuing [sic] video.)

MR. SMITH: All right. Good, good, good.

THE WITNESS: It would be somewhere I'm guessing here, but around in [119] this time frame, maybe a little bit after.

(Freezing video.)

BY MR. SMITH:

Q. Does that show on either of the other videos, the impact?

A. It's – I think it's partially in the frame on Officer Galtelli's. I'm not positive.

Q. We'll get that one out once we finish going through this one. Now, you're to the right of this picture, correct?

A. Yes, sir.

MR. SMITH: Okay. Go ahead and run it, Rob.

(Video playing.)

MR. SMITH: All right. Stop, stop.

(Video stopped.)

BY MR. SMITH:

Q. So after the impact with your car, he backs up. And then who is that coming in to the front of him and to the right?

A. Looking at the video, it's Officer Gardner.

Q. Okay. Now, you're already at the car as

* * *

[124] let it go.

(Video stopped.)

THE VIDEOGRAPHER: Frame by frame?

MR. SMITH: No, let it go, let it go.

(Video playing.)

BY MR. SMITH:

Q. Now, can you tell –

MR. SMITH: Now stop it.

(Video stopped.)

BY MR. SMITH:

Q. Can you tell from looking at that video where you were personally in proximity to that car, whether you were in front of it or to its side? I know you're up toward the front of it.

MR. HANSOM: At what point?

MR. SMITH: When the shooting occurs.

THE WITNESS: Are you asking my recollection or now looking at the tape?

BY MR. SMITH:

Q. Looking at it right now.

A. Looking at the tape, I was between the [125] front edge of the front tire well and the right front corner of the front bumper.

Q. To the side?

A. Slightly to the side.

Q. Not in front of it?

A. No.

Q. Agreed?

A. That's the way it looks on the video, yes.

Q. Did it appear in the video that, in fact, the front of the car made some contact with Officer Gardner's car?

A. Yes.

Q. And not with you?

A. Correct.

Q. Where was Officer – well, let's back it up one more time and see where Officer Gardner and everybody else is.

(Video playing.)

(Video stopped.)

THE VIDEOGRAPHER: Do you want to do slow motion or regular speed?

MR. SMITH: Can you do it in slow motion?

THE VIDEOGRAPHER: Yes, like

* * *

[127] or escape hole to the back after the shooting starts?

A. I probably – not in slow-mo like this, no.

MR. SMITH: Okay. Let's put it back on regular speed.

(Video playing.)

BY MR. SMITH:

Q. He is not moving until after you fire your shots; would you agree?

A. He is not moving backwards until I fired my shots.

Q. Agreed?

A. Right.

MR. SMITH: All right. Stop it a second, Rob.

(Video stopped.)

BY MR. SMITH:

Q. So at the time that the shots are fired, his vehicle is still?

A. No, I would not agree with that.

Q. Which direction is it moving? You've already told me it wasn't moving backwards. Was it moving forwards?

A. It was pushing. Looking at the video, [128] pushing Gardner's vehicle slightly forwards.

MR. SMITH: Okay. Let's play it again.

THE VIDEOGRAPHER: Regular speed?

MR. SMITH: Until I tell you to stop, but yes.

(Video playing.)

MR. SMITH: Now, stop it right there.

(Video stopped.)

BY MR. SMITH:

Q. I want to ask you some questions about the scenario that occurs after you have shot; and we can see in the video that he's backing out and he does that half moon backout on to Jackson, and then there is Officer Gardner shooting at that spot and then somebody shooting in the direction as he pulls off?

A. Looking at the video. I mean, once again, that night I – I didn't know any of that.

Q. I know you say you didn't, but you see that now; do you not?

A. On the videotape, yes, yes, sir.

Q. Did you see any violations of policy

* * *

[133] MR. SMITH: Go ahead, Rob.

THE VIDEOGRAPHER: Hold on, forward.

(Cuing [sic] video.)

THE WITNESS: It looks like Officer Evans closest to the camera. Past that I can't tell from that.

MR. SMITH: Let's keep going, see if we can tell.

(Video played and frozen.)

BY MR. SMITH:

Q. Now, at 31 Officer Evans is separating from the car toward its rear, and is that Officer Gardner with gun extended into the – well, pointing into the car?

A. Looking at the video I believe so.

Q. Okay. And that's at 31. Now, do you see yourself in there anywhere?

A. No.

MR. SMITH: All right. Let's bring it on forward, Rob, and slow.

(Video playing.)

MR. SMITH: Stop.

(Video stopped and frozen.)

* * *

[146] regarding shooting into the car?

A. I knew I had a clear line of fire between myself and the driver. I didn't feel that she was at risk from me hitting her when I fired.

Q. I'm having to pick through what –

A. (Interposing.) Yes, sir.

Q. (Continuing.) – Mr. Smith didn't ask, which is not much.

What is the – or, what at that time was the policy, the Police Department's policy regarding shooting from or at moving vehicles?

A. It was discouraged. They had a fairly narrow set of circumstances.

Q. Does this fit into any of those circumstances?

A. Yes.

Q. Can you tell me which circumstance it fit into?

A. The immediate threat to my life. There had also been a couple of violent felonies committed prior to that point. The big thing is the immediate threat to my life, of course; and then also the fact that given the time frame I had to deal with, I didn't feel there was any other means that I could use.

* * *

[148] x-rays, did some tests, gave me I think some – I don't remember whether it was analgesic or muscle

relaxer, it's been a while; and we also did a posttraumatic incident debriefing, but that was it.

Q. So you've been okay since this –

A. (Interposing.) Oh, yes, sir,

Q. (Continuing.) – occurrence?

And before or during the incident did you ever see a weapon in the hands of either of the occupants of the Rickard car?

A. No, sir, I did not.

MR. HANSOM: Just for clarification, by weapon you mean a firearm?

MR. HOLLOMAN: Anything.

BY MR. HOLLOMAN:

Q. Any weapon, right?

A. In the hands, no.

Q. Did you see a weapon in the car?

A. The car itself was a weapon.

Q. But other than that, no knives, guns, or anything lethal?

A. Not that I saw, sir.

Q. I believe that's all I have. Thank you.

* * *

[152] the early morning hours here with the chief and others?

A. The initial with the paramedics, no, that was on scene; and I believe the hospital was before I went back to the Police Department, if I remember correctly.

Q. Which hospital?

A. Crittenden Regional Hospital.

Q. Have you gotten your medical records from there?

MR. MOSLEY: You have them.

MR. SMITH: I understand.

BY MR. SMITH:

Q. Have you gotten your medical records from there?

A. I got them from the doctor that actually finally made the – analyzed all the tests and all that stuff.

Q. Have you reviewed those records?

A. Briefly.

Q. Was there any internal investigation either by Internal Affairs or shooting investigation done in the department over this incident?

A. I believe there was, but I couldn't tell you what form it took.

[153] Q. Did you participate in it?

A. I never was questioned – I did not – I wasn't questioned, though.

Q. Did you provide any information to such an investigation?

A. Other than just a brief on-scene to my supervisors, a very brief thumbnail of what had happened.

Q. That night?

A. Right; and then the next day Officer McDougal took an offense report from me for the aggravated assault, but there was – that was it.

Q. And is Officer McDougal a Memphis police officer?

A. No, he was a West Police detective at the time.

Q. Who was he investigating on behalf of?

A. I would assume the West Memphis Police Department.

Q. Now, you told Mr. Holloman that in response to one of his questions about making the decision to fire that you felt your life was at risk based on what was going on at that time and the fact that there had been prior acts of violence,

* * *

[Pages 142-143 inadvertently out of order in original exhibit]

[142] (Video playing.)

MR. SMITH: Whoah, whoah.

(Video stopped.)

THE WITNESS: Right here you're referring to the contact before the spinning out, correct, sir? Is that what you're asking me about?

BY MR. SMITH:

Q. Correct.

(Video playing.)

THE WITNESS: I can't really tell, sir.

(Video stopped.)

BY MR. SMITH:

Q. Now, do you know sitting here now having reviewed these videos or from your memory of that night whether his spinout was from having been contacted by one of the other officers' cars?

A. Can you repeat that one more time for me?

Q. Do you know if he spun out because he was hit by one of the other cars?

A. I don't know if he hit them or they hit him, but he spun out subsequent to some contact between the vehicles. I know that.

[143] Q. And when he did spin out, regardless of who initiated the contact, did that spinout include its momentum of coming towards you?

A. I'm not certain.

MR. SMITH: Okay. Well let's back up and show that sequence one more time, Rob, in regular speed.

(Cuing [sic] video.)

MR. SMITH: Now, stop, stop, stop, stop.

(Video playing.)

BY MR. SMITH:

Q. Did that help you any more?

A. Not really.

MR. SMITH: Okay.

(Video stopped.)

BY MR. SMITH:

Q. I don't want to upset you.

A. Yes, sir.

Q. But I have no more questions.

A. That's heart rending.

Q. But Mr. Holloman does.

A. Yes, sir.

CROSS EXAMINATION

* * *

EXHIBIT C

WEST MEMPHIS POLICE DEPARTMENT POLICY AND PROCEDURES

SECTION: Police Pursuits

PURPOSE:

The purpose of this directive is to establish guidelines, policy and procedure to be used by officers in police pursuits.

BACKGROUND:

High speed pursuits will be defined as a vehicle traveling in excess of the posted limit and which in the opinion of the officer and based on the circumstances, is refusing to stop or yield to the emergency lights and siren of the police unit. Each officer involved in a pursuit must continually question himself/herself as to whether the seriousness of the crime justifies continuing the pursuit.

DEFINITIONS:

VEHICLE PURSUIT AND HOT PURSUIT:

An attempt by a West Memphis Police officer in an official vehicle to stop a moving vehicle when the driver of such vehicle is aware the officer is signaling the vehicle to stop and is resisting the stop by maintaining or increasing vehicle speed, making evasive maneuvers, or otherwise ignoring the officer's attempt to stop the vehicle.

OFFICIAL VEHICLE:

An official vehicle is a vehicle issued by the Department equipped with emergency lights and siren and operated by an officer of the West Memphis Police Department.

SUPERVISING OFFICER:

A supervising officer shall be a supervisor of the rank of Sergeant or above or the officially designated officer in charge.

PRIMARY UNIT:

The primary unit is the officer who is closest to the fleeing vehicle. Officers in colored, partially marked, or unmarked official vehicles should turn over primary unit status upon the arrival of a marked secondary unit.

SECONDARY UNIT:

The second officer to engage in a pursuit, whether upon the request of the primary unit or supervising officer.

THIRD UNIT:

The assigned or requested third unit.

PURSUIT GUIDELINES:

Officers engaged in vehicle pursuits shall at all times drive in a manner exercising reasonable care for the safety of themselves and all other persons

and property within the pursuit area. The following guidelines are intended to assist officers in making sound decisions regarding pursuits.

A. A minimum but sufficient number of police units should be committed to a pursuit unless a supervising officer specifically advises that additional units are needed to safely affect the arrest of the suspect(s).

B. Only official vehicles shall engage in pursuits. Emergency lighting equipment and siren should be in operation throughout the pursuit.

C. Officers involved in pursuits should use their unit number with all radio transmissions and should communicate on the same radio frequency.

D. Officers transporting persons other than commissioned officers shall not engage in pursuits. This does not apply to approved observation riders who have signed waivers relieving the WMPD of any civil liability due to on the job injury.

E. Vehicles operated by non-commissioned personnel shall not engage in pursuits.

F. Officers shall not discharge a firearm while operating a moving vehicle involved in a pursuit except when necessary to protect another person, or when necessary as an act of self-defense.

G. Involved officers may discontinue their involvement at any time during the pursuit.

H. Motorcycles shall not engage in pursuits except when necessary to apprehend a fleeing dangerous felon. (The act of fleeing shall not constitute a dangerous felony for this purpose).

PRIMARY UNIT RESPONSIBILITIES:

The primary unit involved in a pursuit shall be responsible for advising the Communications Center of the following:

1. Officer identification;
2. Location, direction of travel, speed, and traffic volume on a continuous basis;
3. Description of the fleeing vehicle and license number, if known;
4. Description of the suspect driver, if known;
5. Reason for the pursuit, including crimes or violations committed.

SECONDARY UNIT RESPONSIBILITIES:

The acknowledged or assigned secondary unit, upon joining the pursuit, shall advise the Communications Center of its involvement. The secondary unit shall be primarily responsible for radio communications so that the primary unit can devote full attention to the fleeing vehicle. The secondary unit shall replace the primary unit in the event the primary unit cannot continue the pursuit.

BACKUP UNIT(S) RESPONSIBILITIES:

Other units in the pursuit area shall monitor the progress of the pursuit. They shall not engage in the pursuit unless requested to do so by the primary unit or directed to do so by a supervising officer. These units should be ready to replace any assigned unit in the event the assigned unit cannot continue the pursuit. They should also be in position to respond to any collision that may result from the pursuit. Back-up units should be available to assist in the apprehension of the suspect(s) at the termination of the pursuit or provide any needed traffic control.

SUPERVISING OFFICER RESPONSIBILITIES:

Upon notification of a pursuit, the on duty shift supervisor shall initially assume supervisory command of the pursuit. Any supervisor who assumes command of a pursuit shall advise the dispatcher. (Supervisors engaged in a pursuit may have supervisory command of the pursuit). The supervisor will closely and continually monitor the progress of the pursuit as to:

1. Length and time of the pursuit;
2. Number of officers and vehicles involved;
3. Seriousness of criminal act involved;
4. Danger to the public and innocent bystanders and the safety of the officers involved;
5. Weather conditions;

6. Jurisdiction;

7. Pursuit tactics.

The supervisor in command of the pursuit may order the termination of the pursuit at any time.

The shift commander or any higher-ranking officer shall continue supervisory command of a pursuit until it has ended.

COMMUNICATIONS – DISPATCHER RESPONSIBILITIES:

The dispatcher shall immediately broadcast available information concerning a pursuit to local units and designate the radio frequency to be used during the pursuit. It shall follow departmental procedures for the use of emergency traffic status.

The dispatcher shall advise the on duty shift commander and any other appropriate supervisor(s) of the pursuit. Initiation of any change of supervisory command shall be communicated to all involved units. Through available data/information, the dispatcher shall attempt to obtain information concerning the identity of the driver and ownership of the vehicle.

When the pursuit approaches or occurs in a different jurisdiction, the dispatcher shall immediately notify the affected jurisdiction. When a pursuit extends into or approaches an adjoining jurisdiction, the supervisor

shall transfer the pursuit to the newly affected jurisdiction as soon as practical.

WRONG-WAY PURSUITS:

Officers should not pursue vehicles that proceed the wrong way on a divided highway, freeway, freeway access, or one-way street unless specifically authorized to do so by a supervisor.

PURSUITS INTO ANOTHER JURISDICTION:

When a pursuit extends into a different jurisdiction, the pursuing officers may turn over the pursuit to a local officer, if available, and advise the dispatcher that their involvement has been terminated.

INTERSTATE PURSUIT:

Arkansas law permits the interstate fresh pursuit of a person who has committed a felony or who is reasonably suspected of having committed a felony. (Ark. Code Ann. 16-81-401, et.seq.). Officers making a felony arrest in another state shall take the arrestee, without unnecessary delay, before a magistrate of the county in the state in which the arrest is made.

OTHER AGENCY PURSUITS:

Officers will assist other agencies in pursuits when requested or notified. The appropriate shift commander shall be notified of the engagement as soon

as practical. Officers engaged in other agency pursuits shall adhere to all West Memphis Police Department pursuit policies.

HELICOPTER/AIR SURVEILLANCE:

If Helicopter/Air surveillance is available, ground units should turn the pursuit over to the Air Units and follow the suspect vehicle at a reasonable distance and speed. Ground units will be advised and directed by Air Units until the pursuit is terminated.

INITIATION AND TERMINATION OF A PURSUIT:

Officers should always exercise discretion whether to initiate a pursuit. The decision to terminate a pursuit can be made by the primary unit or ordered by a supervising officer at any time during the pursuit. Those making decisions to initiate or terminate a pursuit should consider the nature of the offense, the time of day, an evaluation or weather, traffic conditions, geography, and familiarity with the area, types of official vehicles involved, and the actions of the fleeing driver.

A pursuit should be terminated when:

A. The officer or supervising officer believes that the danger to the public outweighs the need for immediate apprehension of the suspect.

B. A supervising officer orders the pursuit terminated.

C. The name and address of the suspect is known to the officer and the offense involved is a traffic violation, a misdemeanor, or a non-violent felony.

D. The officer loses visual contact with the fleeing vehicle for an extended period of time.

Whenever an involved official vehicle experiences mechanical breakdown or equipment failure involving lights, siren, radio, and/or brakes, such unit shall terminate its involvement in the pursuit.

Officers who have terminated a pursuit shall deactivate emergency equipment and drive at routine patrol speeds. Upon termination, officers may follow the vehicle's predicted route of travel.

METHODS OF FORCIBLE STOP

BOXING:

Boxing is the intentional surrounding of a violator's vehicle with official vehicles, which are then slowed to a stop along with the suspect vehicle and which does not involve intentional contact between the vehicles. Boxing of fleeing vehicles is not considered use of lethal force unless the circumstances clearly show otherwise.

ROADBLOCKS:

A roadblock is a barricade using vehicles or other obstructions (excluding the hollow spike strip) across

a roadway set up to stop or prevent the escape of a fleeing vehicle.

Roadblocks may be used to stop a fleeing vehicle when necessary, provided:

1. A description of the suspect(s) and suspect vehicle is available (the description must be adequate for proper identification).
2. The roadblock is plainly visible to the operator of the fleeing vehicle from a distance that would allow the operator of the fleeing vehicle to safely stop before reaching the roadblock.
3. A plainly visible escape route is made available to the suspect vehicle (unless the officers involved are justified in using lethal force).
4. Supervisory approval is obtained.

INVESTIGATIONS OF PURSUITS:

After all pursuits, the involved officer(s) shall promptly prepare a report that shall be reviewed and approved by the officer's immediate supervisor. This report shall be forwarded through the chain of command to be reviewed and critiqued.

/s/ Robert Paudert

Robert Paudert
Chief of Police

EXHIBIT D

WEST MEMPHIS POLICE DEPARTMENT POLICY AND PROCEDURES

SECTION: Deadly Force

The following policy will govern the use of deadly force and the investigative procedures thereof:

1. Definitions:

   a. Violent Felony – A felony in which the suspect has used, or threatened to use, force that will cause death or serious bodily injury.

   b. Deadly Force – The amount of force that is sufficient to, intended to, or may be reasonably expected to inflict serious bodily injury and/or death. This includes the discharge of any firearm at, near, or in the direction of any individual.

   c. Juvenile – Any person under the age of eighteen (18) years.

   d. Probable Cause – Facts and circumstances known to a reasonable and prudent police officer, which lead him to reasonably conclude that a crime has been committed and the suspect, committed it. Probable cause exists when facts and circumstances within an officer's knowledge, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been, or is being committed. Probable cause is such belief as would appear reasonable to

the ordinary and prudent police officer of similar experience under like circumstances. Such belief is not reasonable if the officer is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief of fact or of law which is material to the justifiability of his use of force.

e. Exhaustion of All Other Reasonable Means – All other reasonable means have been exhausted when an officer has tried to control conflict by using all alternate methods other than deadly force; however, all other reasonable means may be considered to have been exhausted when an officer analyzes a set of circumstances and honestly and reasonably concludes that any other means will be ineffective, useless, or hazardous to the officer or some innocent third party. In order to qualify as having exhausted all other reasonable means, the officer must be able to show that his/her use of deadly force was *IMMEDIATELY* necessary. The officer must also have communicated his identity and purpose to the suspect, unless these facts are already known by the suspect or cannot REASONABLY be made known to the suspect under the circumstances. Where feasible, warning should be given the suspect by identifying himself/herself as an officer, or by an oral order to halt, or by an oral warning that deadly force might be used. In deciding whether the use of deadly force is reasonably necessary, the officer must consider whether other

action could eliminate the immediate need for deadly force.

2. Use of Deadly Force Authorized:

Officers shall use only the minimum amount of force, which is consistent with the accomplishment of their duties and must exhaust every other reasonable means of prevention, apprehension, or defense before resorting to the use of deadly force.

Pursuant to state law, deadly force may be used in the following circumstances, *AFTER ALL OTHER REASONABLE MEANS OF APPREHENSION OR PREVENTION HAVE BEEN EXHAUSTED*:

a. In self defense where the officer has been attacked with deadly force; is being threatened with the use of deadly force; or where the officer has probable cause and reasonably perceives an immediate threat of deadly force.

b. In defense of others where a third party has been attacked with deadly force; is being threatened with the use of deadly force; is in danger of serious bodily injury or death during the actual commission of a crime against his/her person; or where the officer has probable cause and reasonably perceives an immediate threat of deadly force to a third party.

c. To prevent the commission of a violent felony in progress.

d. If the officer has probable cause to believe that a fleeing suspect has committed a violent felony.

e. If the officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or to others unless he/she is immediately apprehended.

f. To kill an animal which poses a direct threat to the safety of the officer or other persons.

3. Use of Deadly Force Prohibited:

The use of deadly force is prohibited in the following circumstances:

a. To apprehend or arrest a person for a misdemeanor offense.

b. To effect the arrest of any person for escape from the commission of any misdemeanor offense.

c. As warning shots.

d. To apprehend or arrest a person known to be or believed to be a juvenile, unless the use of deadly force is immediately necessary in the defense of the officer's life or of another person's life when all other reasonable means have been exhausted. The officer's knowledge or belief of a person's age may be based upon factors such as the officer's previous knowledge of the person, his/her observations of the person's appearance, or upon reliable information given to him/her by other persons.

e. To apprehend or arrest a person fleeing from a felony which is *not* a violent felony. This includes, but is not limited to, felonies such as auto theft, theft of property, embezzlement, fraud, burglary of an auto, or any other felony that does not involve the use of deadly force, attempted use of deadly force, or threatened use of deadly force.

f. From or at any moving vehicle, except in a case where a violent felony has been committed in the officer's presence and the officer has determined that there is a much greater threat to innocent lives by not using deadly force. In making this determination, the officer must consider the consequences of stray shots endangering innocent parties and must consider the consequences of the vehicle going out of control at a high rate of speed. Officers should be extremely cautious in using deadly force in self-defense when the deadly force used by the other person is an automobile and the other person is trying to get away. The suspect's intentions are usually ambiguous, and the officer can usually escape harm at least as well by evading the vehicle as he/she can by standing his/her ground and firing at the oncoming vehicle. An officer almost never has a safe, effective shot at a moving vehicle. This is particularly true when an officer is involved in a high-speed chase and is shooting from a moving vehicle.

g. In any other case where the officer does not have a clear field of fire and cannot be

virtually certain that only the suspect will be hit and that the potential for harm to innocent persons is minimal.

4. Notification Procedures When Weapons are Fired:

When any officer of the West Memphis Police Department discharges any firearm, whether on duty or off duty, regardless of the type of firearm, the officer will immediately report the incident to the dispatcher who will notify the Shift Commander. This Commander will proceed to the scene of the shooting and will begin an immediate investigation and notify the Chief of Police of the incident. The Commander will prepare the Supervisor's Shooting Incident Report and will also have the officer prepare a Firearms Use Report.

The Inspector of the Internal Affairs Unit and a Shooting Investigation Team will be notified and will respond for an on-the-scene investigation in all shooting incidents, including:

a. Any shooting by an officer, either on-duty or off-duty, regardless of the weapon, which involves death or injury to a suspect, other officers, or a citizen.

b. Any shooting by an officer, either on-duty or off-duty, regardless of the weapon, where a suspect has been fired upon.

c. Any incident where a suspect has shot an officer.

d. All accidental shootings by an officer that occur, on duty or off duty, resulting in property

damage involving a police issued weapon listed as a police service weapon.

5. Investigation:

   A. The Internal Affairs Unit Commander will coordinate a shooting investigation team. The shooting investigation team members shall be designated by the Chief and/or Asst. Chief and will be assigned as needed. Other department personnel may be assigned to assist the team as necessary.

   B. The primary objective of the Shooting Investigation Team is to investigate any and all shooting incidents involving police officers which occur as a result of intervention by officer(s) in a crime, self defense, or defense of another situation. When this happens, the Shooting Investigation Team will be called to handle the investigation of the incident including obtaining statements and supplemental reports. Criminal charges placed against a suspect wounded during the commission of a crime will be handled by the Shooting Investigation Team.

6. Review Procedures:

   All reports, including the Firearms Use Report, Supervisor's Shooting Incident will be submitted to the Internal Affairs Division. The Internal Affairs Commander will present the report, Crime Scene Report, Shooting Investigation Report, copies of arrest reports, offense reports, and memos to the Chief of Police for review.

Upon reviewing all initial reports, the Chief of Police will take the following action:

a. Order a new and/or any additional investigations as required.

b. Concur with the investigative findings that the officer(s) was justified in the use of deadly force and order notification of the officer of said findings by letter.

c. Concur with the investigative findings that the officer(s) was not justified in the use of deadly force and direct administrative processing of the Statement of Charges issued by the Shoot Team Commander under the established disciplinary procedures.

/s/ Robert Paudert

Robert Paudert
Chief of Police

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Estate of KELLY A. ALLEN, Deceased, CLAYTON DAVID ALLEN, MARIA NICOLE ALLEN, a minor by next friend, Kenneth B. Allen, ALEXIS LANE ALLEN, a minor by next friend, Kenneth B. Allen — **PLAINTIFFS**

v.

CASE NO. 05-2489 DV

CITY OF WEST MEMPHIS, MAYOR WILLIAM H. JOHNSON, CITY OF WEST MEMPHIS POLICE DEPARTMENT, ROBERT PAUDERT, in his personal and official capacity as Chief of the West Memphis Police Department, OFFICER VANCE PLUMHOFF, in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER JOHN BRYAN GARDNER in his personal and official capacity as a police officer of the West Memphis Police Department, OFFICER TONY [sic] GALTELLI in his personal and official capacity as a police officer of the West Memphis Police Department and ANY OTHER UNNAMED

OFFICERS of the WEST MEMPHIS POLICE DEPARTMENT, in their personal and official Capacities	**DEFENDANTS/ THIRD PARTY PLAINTIFFS**
v.	
ESTATE OF DONALD RICKARD, deceased, through its Administrator, SCOTT PEATROSS	**THIRD PARTY DEFENDANT**

Consolidated with

WHITNE RICKARD, a Minor Child, Individually, and as Surviving Daughter of DONALD RICKARD, Deceased, By and through her mother SAMANTHA RICKARD As Parent and Next Friend	**PLAINTIFF**
v.	**CASE NO. 05-2585 D V**
CITY OF WEST MEMPHIS, ARKANSAS; OFFICER VANCE PLUMHOFF, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER TONY [sic] GALTELLI, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JOHN GARDNER, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER	

LANCE ELLIS, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JIMMY EVANS, individually and in his official capacity as an officer of the West Memphis Police Department; OFFICER JOSEPH FORTHMAN, individually and in his official capacity as an officer of the West Memphis Police Department; CHIEF ROBERT PAUDERT, individually and in his official capacity as Chief of the West Memphis Police Department **DEFENDANTS**

PLAINTIFF WHITNE RICKARD'S RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

COME NOW Whitne Rickard, a Minor Child, Individually, and as Surviving Daughter of Donald Rickard, Deceased, by and through her mother Samantha Rickard, As Parent and Next Friend, and by and through the undersigned attorneys, and hereby respond to the Defendants' Statement of Undisputed Material Facts as follows.

PRELIMINARY STATEMENT

Except where otherwise noted, it is assumed in instances in which the Defendants refer to "Plaintiffs" in their asserted facts that the references to Plaintiffs

are intended to refer to the Plaintiffs' decedents in these consolidated cases, Donald Rickard and Kelly Allen, rather than the named Plaintiffs themselves. The footnotes contained herein are footnotes set forth by the Defendants in their fact statements, and not those of the Plaintiffs.

Characterizations by defense counsel of what the police car videotapes or other evidentiary items depict, where asserted as fact, are specifically disputed in the manner indicated herein.

Additionally, to the extent the terms "Officer" or "Officers" may be used interchangeably to describe individual Defendants such as Lieutenant Forthman and Sergeant Plumhoff, the terms Officer or Officers are intended to be used generally, and not intended to reflect any lack of recognition of a particular rank attained by any particular Defendant.

RESPONSE TO STATEMENTS OF FACT

1. Donald Rickard and Kelly Allen were driver and passenger, respectively, of a white Honda Accord on or about the midnight hour of June 18, 2004, when a West Memphis Police Officer Forthman actuated a traffic stop of the Honda.

RESPONSE: Although the month is stated above as June when the events at issue occurred in July of 2004, this asserted fact is otherwise undisputed.

2. The stop was initially based on probable cause of a traffic offense, an inoperable headlight. Exhibit A, Defendants' Responses to Interrogatories, No. 7.

RESPONSE: It is indisputed [sic] that the initial stop was based upon an inoperable headlight.

3. At various points throughout the pursuit, the following officers joined in the pursuit: Lt. Joseph Forthman, Sergeant Vance Plumhoff, Officer Jimmy Evans, Officer John Gardner, Officer Lance Ellis, and Officer Tony [sic] Galtelli. Exhibit A, Defendants' Responses to Interrogatories, No. 7.

RESPONSE: Undisputed.

4. Chief Robert Paudert was out of town at the time of the pursuit and thus not involved in the pursuit. Exhibit A, Defendants' Responses to Interrogatories, No. 7.

RESPONSE: On information and belief, undisputed, although Plaintiffs have yet to depose Chief Paudert in this case, and the materiality of this asserted fact is disputed to the extent Defendants may seek to convince this Court that Chief Paudert can have no liability under any theory because he may have been out of town at the time of the events in question.

5. Officer Forthman first saw the vehicle driven by Donald Rickard in the area of Martin Luther King Boulevard and Southland Drive in West Memphis, Arkansas about three or four city blocks from where

the Plaintiffs actually were stopped by Officer Forthman. Exhibit B, Forthman Depo. 18:14-24; see also Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No. 7, attached Forthman's Memphis Homicide Witness Statement, Bates No. 001131 (hereinafter Forthman's Memphis Homcide Witness Statement).

RESPONSE: With the understanding that the reference to the Plaintiffs is intended to refer in actuality to the Plaintiffs' decedents Donald Rickard and Kelly Allen, undisputed.

6. Officer Joseph Forthman was driving patrol unit # 279, which had a video camera that recorded the events from when he first turned on his lights to stop the vehicle driven by Donald Rickard through the entire sequence of events. Exhibit A, Defendants' Responses to Interrogatories, No. 8; Forthman's Memphis Homicide Witness Statement, Bates No. 001130; Exhibit B, Forthman Depo. 19:6-24, 94:18-24.

RESPONSE: Disputed as stated only to the extent that Lieutenant Forthman and Sergeant Plumhoff have testified that various individual events were not entirely or completely clearly depicted on the unit 279 video. Plaintiffs rely upon their accompanying Memorandum of Law. However, it is not disputed that among the three available videos, the unit 279 video provides the best overall depiction of the events.

7. Officer Forthman originally stopped the white Honda because the vehicle only had one operating headlight. Exhibit A, Responses to Interrogatories and Requests for Production of Documents, Forthman Answer to Interrogatory No. 7; Forthman's Memphis Homicide Witness Statement, Bates No. 001130; Exhibit B, Forthman Depo. 19:1-5.

RESPONSE: Undisputed, on information and belief.

8. At approximately 12:10 a.m., Officer Forthman stopped the white Honda at a Diamond Shamrock, a gas station, in West Memphis, Arkansas. Forthman's Memphis Homicide Statement, Bates No. 001131; Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.8 attached Videotape of Unit #279, at 11:08:12[1] (hereinafter Videotape of Unit #279).

RESPONSE: Accepting that the time stamp from the video of unit 279 is approximately one hour behind actual time as stated by the Defendants in Footnote 1 of their Statement of Undisputed Facts, this asserted fact is undisputed; however, Plaintiffs reserve the right to rely upon the various time stamp entries set forth in their Memorandum of Law and in this Response as evidence of their contentions in this

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[1] It is generally agreed that the time-stamp on Videotape of Unit #279 is approximately one hour behind the actual time that the events occurred. *See* Exhibit B, Forthman Depo., 116:3-10.

case, notwithstanding the fact that the time stamps may not have depicted actual time.

9. The white Honda had a State of Georgia license plate. Exhibit B, Forthman Depo. 95:17-22; Videotape of Unit #279, at 11:08:19.

RESPONSE: Undisputed, on information and belief.

10. Officer Forthman approached the vehicle on the driver's side. Videotape of Unit #279, at11:08:28; Exhibit B, Forthman Depo. 23:23-24, 24:1.

RESPONSE: Undisputed.

11. As Officer Forthman approached the vehicle, Donald Rickard, the driver, turned and stuck his head out of the window. Mr. Rickard yelled to Officer Forthman that he knew that his headlight was out and that he was going to Wal-Mart to fix it. Exhibit B, Forthman Depo. 25:19-24, 98:4-9; Videotape of Unit #279, at 11:08:21.

RESPONSE: Although this asserted fact may not state the actual words verbatim, it is nevertheless undisputed that the concepts set forth above were stated by Mr. Rickard.

12. Officer Forthman testified that "[i]t's usually unusual for somebody to already start talking to me before I even get out of my car." Exhibit B, Forthman Depo. 26:4-14.

RESPONSE: Undisputed that Officer Forthman provided such testimony; however, the materiality of such testimony is disputed.

13. As Officer Forthman approached the vehicle, he asked the driver, Donald Rickard, for his license and registration. Videotape of Unit #279, at 11:08:26.

RESPONSE: Undisputed.

14. When Officer Forthman walked to the driver-side window, he noticed an indentation, roughly the size of a head or a basketball, in the windshield glass on the driver-side portion of the Honda. Forthman's Memphis Homicide Statement, Bates No. 001131; Exhibit B, Forthman Depo. 27:2-6.

RESPONSE: Undisputed that Officer Forthman provided such testimony.

15. Officer Forthman believed the windshield appeared to have been broken in the recent past, because Officer Forthman saw that glass shavings were still on the vehicle's dashboard. Exhibit B, Forthman Depo. 27:6-7.

RESPONSE: Undisputed that Officer Forthman provided such testimony; however, the materiality of Officer Forthman's subjective reactions is respectfully disputed.

16. Officer Forthman then asked the driver, Donald Rickard, what was wrong with the windshield.

Videotape of Unit #279, at 11:08:34-11:08:40; Exhibit B, Forthman Depo. 27:8-16.

RESPONSE: Undisputed.

17. The female passenger, Kelly Allen, answered that they had hit a curb and had broken the windshield. Videotape of Unit #279, at 11:08:34-11:08:40; Exhibit B, Forthman Depo. 27:8-16.

RESPONSE: Although this asserted fact may not be a precise verbatim recitation of the words used by Kelly Allen, it is indisputed from a review of the video that words to that effect were apparently spoken by Kelly Allen.

18. Officer Plumhoff testified why the windshield break would lead an officer to be suspicious: "in the case where there is a round break adjacent to one of the side pillars on the vehicle and the sprinkles of glass on the dashboard would tell me that it was a more than likely a recent event, I [Officer Plumhoff] would be suspicious that someone had possibly been struck by that vehicle, like a pedestrian. I've seen that sort of break in cases were a pedestrian had been struck." Exhibit C, Plumhoff Depo. 35:16-22.

RESPONSE: Undisputed that Sergeant Plumhoff provided such testimony; however, the materiality of such testimony is respectfully disputed. Sergeant Plumhoff did not make the stop and did not assess the suspects' demeanor or behavior at the stop.

19. Upon seeing beer in the Plaintiffs' vehicle in plain view, Officer Forthman asked: "You haven't had

any Keystone tonight have you?" Videotape of Unit #279, at 11:08:58; Exhibit B, Forthman Depo. 28:2-4, 31:15-19.

RESPONSE: Undisputed that Lieutenant Forthman provided such testimony and that such a question, either in those words or similar words, appears on the video, except to the extent that the characterization "plain view" is apparently made by defense counsel and does not appear in the cited testimony of Forthman.

20. Mr. Rickard responded that he had not. Videotape of Unit #279, at 11:08:58; Exhibit B, Forthman Depo. 28:2-4.

RESPONSE: Undisputed.

21. Officer Forthman then asked the driver where he was coming from. Forthman's Memphis Homicide Statement, Bates No. 001131; Videotape of Unit #279, at 11:09:03; Exhibit B, Forthman Depo. 27:18-19.

RESPONSE: Undisputed.

22. Mr. Rickard responded that he was coming from his hotel. Forthman's Memphis Homicide Statement, Bates No. 001131; Videotape of Unit #279, at 11:09:03; Exhibit B, Forthman Depo. 27:18-19.

RESPONSE: Undisputed that those words or similar words were used by Mr. Rickard.

23. Officer Forthman then inquired as to which hotel the occupants were coming from; however, the

driver could not remember the name of the hotel. Forthman's Memphis Homicide Statement, Bates No. 001131; Videotape of Unit #279, at 11:09:07; Exhibit B, Forthman Depo. 27:19-20.

RESPONSE: Undisputed.

24. At this point, Officer Forthman was still waiting for Donald Rickard to produce his driver's license, which caused Officer Forthman to begin watching Rickard's hands, and Officer Forthman noticed that Rickard kept passing over what appeared to be some form of Tennessee identification in his wallet and that Rickard appeared to be very nervous because Rickard's hands were shaking. Forthman's Memphis Homicide Statement, Bates No. 001131; Exhibit B, Forthman Depo. 27:20-24, 28:1, 4-9.

RESPONSE: Undisputed that Forthman provided such testimony; however, the materiality of such testimony is disputed. Forthman also testified that it is not unusual for a person to be nervous when pulled over by police, and Forthman himself (who is no longer a police officer) becomes nervous himself when pulled over by a police officer. Depo of Forthman, at 30:05-:11.

25. Officers are trained to be vigilant of a person's hands more so than any other part of a person's body while officers are interacting with them "because hands kill you, faces don't." Exhibit B, Forthman Depo. 33:1-17; 34:2-6.

RESPONSE: Undisputed that Forthman provided such testimony.

26. Officer Forthman asked Rickard to step out of the vehicle, "[b]ecause he was so nervous and he went over his I.D. card or driver's license several times without producing it to me." Exhibit B, Forthman Depo., 29:16-20.

RESPONSE: Undisputed that Forthman provided such testimony.

27. In addition, Officer Forthman thought it would be best to separate Rickard from Allen because it appeared that Rickard was relying on Allen to respond to the officer, and hopefully Officer Forthman would be able to get identification from Rickard as well as calming him down. Exhibit B, Forthman Depo., 29:23-24, 30:1-4.

RESPONSE: Undisputed that Forthman provided such testimony.

28. After being asked twice by Officer Forthman to step out of the vehicle, Donald Rickard, looked at Officer Forthman, then looked at Kelly Allen, and then they sped away from Officer Forthman unlawfully. Forthman's Memphis Homicide Statement, Bates No. 001131; Videotape of Unit # 279, at 11:09:21; see Ark. Code Ann. §5-54-125 (2009).

RESPONSE: Undisputed that Forthman provided such testimony; however, it is respectfully disputed as to whether the unit 279 video can be

clearly understood to depict the exact activity described before the vehicle drove away.

29. Officer Forthman returned to his vehicle and informed dispatch that he had a "runner," meaning a suspect was fleeing the scene of a traffic stop. Forthman's Memphis Homicide Statement, Bates No. 001131; Videotape of Unit # 279, at 11:09:30.

RESPONSE: Undisputed that Forthman used words to that effect.

30. Officer Plumhoff heard over the radio that Officer Forthman had a runner, which Officer Plumhoff interpreted as a pursuit had begun. Exhibit C, Plumhoff Depo. 24:35.

RESPONSE: Undisputed, on information and belief.

31. Officer Vance Plumhoff was driving patrol unit #290, which did not have a video camera. Exhibit A, Defendants' Responses to Interrogatories, No. 8.

RESPONSE: Undisputed, on information and belief.

32. Officer Plumhoff was on Martin Luther King Drive in West Memphis, Arkansas, which is within close proximity to where Officer Forthman had stopped the Plaintiffs' vehicle, when he became aware of the pursuit. Exhibit C, Plumhoff Depo. 19:7-15.

RESPONSE: Undisputed, on information and belief.

33. Shortly after learning of the pursuit, Officer Plumhoff became involved in the pursuit and quickly became primary (lead police vehicle in the chase). Exhibit B, Forthman Depo. 46:8-17; Exhibit C, Plumhoff Depo. 19:7-22; Videotape of Unit #279, at 11:09:44.

RESPONSE: Undisputed, on information and belief.

34. While traveling northbound on Martin Luther King Ave., Officer Jimmy Evans saw a white vehicle being pursued by two other West Memphis Police vehicles turn onto the on-ramp of I-40, at which point he too joined the pursuit. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No. 7 attached Evans' Memphis Homicide Statement, Bates No. 001143 (hereinafter Evans' Memphis Homicide Statement).

RESPONSE: Undisputed that Officer Evans joined the pursuit.

35. Officer Jimmy Evans was driving patrol unit #205, which was not equipped with a video camera. Exhibit A, Defendants' Responses to Interrogatories, No. 8; Evans' Memphis Homicide Witness Statement, Bates No. 001142.

RESPONSE: Undisputed, on information and belief.

36. Officer Lance Ellis was in route to aid Officer Forthman in his stop, when he learned of the pursuit shortly before seeing the Plaintiffs' vehicle

being followed by Officer Forthman, Officer Plumhoff, and Officer Evans; Officer Ellis then joined the pursuit after the pursuit was on I-40. Exhibit F, Affidavit of Lance Ellis ¶¶ 9-11.

RESPONSE: Undisputed, on information and belief; however, to the extent Defendants rely upon the Affidavit of Officer Ellis (who has not yet been deposed) and the Affidavits of other officers who have not yet been deposed in this case, particularly including conclusory statements of fact and/or law by the affiants that all of their actions were taken pursuant to and in accordance with the Constitution and laws of the United States and the States of Arkansas and Tennessee, and to the extent cross examination may reveal differences in or revisions to the record from such officers, Plaintiffs note that the reliance on such Affidavits is premature and respectfully reserve the right to amend any factual responses, subject to the discretion of this Court. To avoid unnecessary repetition of these points, but without waiving them as to each officer who has yet to be deposed, Plaintiffs also identify each such officer below, but without repeating the points stated above in this paragraph.

37. Officer Lance Ellis was driving patrol unit #284, which was equipped with a video camera that was able to record some of the events at issue in this case. Exhibit A, Defendants' Responses to Interrogatories, No. 8.

RESPONSE: Undisputed.

38. When Officer Galtelli heard Officer Forthman state over the radio that he had a runner, Officer Galtelli was working a traffic stop with Officer Gardner, who instructed him to assist in the pursuit. Exhibit G, Affidavit of Troy Galtelli ¶¶ 6-11.

RESPONSE: Undisputed, on information and belief; however, Plaintiffs note that Officer Galtelli is among the officers who have not yet been deposed in this case.

39. Officer Troy Galtelli was driving patrol unit #286, which was equipped with a video camera that was able to record the events at issue in this case. Exhibit A, Defendants' Responses to Interrogatories, No. 8.

RESPONSE: Disputed to the extent this asserted fact may be read as implying that all events described by the Defendants were recorded by the unit 286 video; however, it is undisputed that the unit 286 video did depict some of the events at issue.

40. After finishing the traffic stop, Officer Gardner was the last police officer to join the pursuit. Exhibit H, Affidavit of John Gardner ¶¶ 9-13.

RESPONSE: Undisputed, on information and belief; however, Plaintiffs note that Officer Gardner is also among those officers who have yet to be deposed in this case.

41. Officer John Gardner was driving patrol unit #287, which was equipped with a video camera

that was not operational. Exhibit A, Defendants' Responses to Interrogatories, No. 8.

RESPONSE: Undisputed, on information and belief.

42. While on the I-40 on-ramp, Officer Forthman stated over the radio "we got enough [meaning police vehicles to perform a rolling roadblock] lets shut him down before he gets to Memphis." Videotape of Unit #279, at 11:09:57.

RESPONSE: Undisputed that Forthman used either those words or words to that effect.

43. Once on I-40, Officer Forthman stated "I gonna get in front of him . . . whoever to uh . . . I am going to get in front of him here" as he maneuvered his police car to the left lane in an attempt to get around Plaintiffs vehicle. Videotape of Unit #279, at 11:10:16.

RESPONSE: Undisputed that Forthman used either those words or words to that effect.

44. In his deposition, Officer Forthman explains the purpose of a rolling roadblock and how it is typically executed:

> It's where we utilize three to four cars depending on where you're at, normally it's four cars, and the purpose behind the rolling roadblock is to slow down the fleeing vehicle where we can bring it to a stop by the use of blocking him in with our vehicles. Basically what would happen, . . . , you first need

> somebody in front of them to slow them down; and then you need somebody to the left and right so he'd have a hard time maneuvering around the car in front. The one in back would keep him from coming to a dead stop and maneuvering around the cars. So basically it's there to stop a pursuit at a safe means so we can bring it to an end.

Exhibit B, Forthman Depo. 174:10-24.

RESPONSE: Undisputed that Officer Fortham [sic] provided such testimony; however, the materiality of such testimony is respectfully disputed.

45. The video from Officer Forthman's vehicle shows Officer Jimmy Evans going around Officer Forthman's vehicle. Videotape of Unit #279, at 11:11:14.

RESPONSE: Undisputed, on information and belief.

46. Then Officer Forthman tells Officer Evans that if he can get in front of the White Honda then do so. Videotape of Unit #279, at 11:11:32.

RESPONSE: Undisputed that Forthman used either those words or words to that effect.

47. Before Officer Evans had a chance to get in front of the Plaintiffs, Officer Plumhoff is heard over the radio saying, "he [driver of the fleeing vehicle] just tried to ram me." Videotape of Unit #279, at 11:11:36.

RESPONSE: Undisputed that such audio appears on the unit 279 video; however, the accuracy of the assertion contained in that audio that an attempted ramming had occurred is respectfully disputed. Plaintiffs respectfully submit that the identified attempted ramming is not clearly demonstrated on the video of unit 279, and the accuracy of the assertion that an attempted ramming occurred should be a jury question. Plaintiffs rely upon the testimony set forth in their accompanying Memorandum of Law.

48. Officer Plumhoff testified that this was the first encounter he had with the white Honda. Exhibit D, Video of Plumhoff Deposition, DVD #2, 12:29:18-12:30:19[2]; Exhibit C, Officer Plumhoff Depo., 111:13-24.

RESPONSE: Undisputed that Plumhoff provided such testimony; however, the materiality of this asserted fact is respectfully disputed.

49. Because the flashing lights in the dashboard video somewhat washout the aggravated assault committed by the driver against Officer Plumhoff, he, Officer Plumhoff, in his deposition, while pointing to the Videotape of Unit #279 (stopped at 11:11:34), explains "Right there you can see him move from left to right, and I'm over the fog line into . . . " Exhibit D,

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[2] In order to be consistent, all specific references to videos will be based on the timestamp on the video screen.

Plumhoff Deposition, DVD #2 at 12:30:4; Exhibit C, Plumhoff Depo. 112:7-9, 113:11-20; Videotape of Unit #279, at 11:11:34.

RESPONSE: Disputed as stated, particularly to the extent this asserted fact is offered as evidence of an attempted ramming having actually occurred. Referring to the place on the videotape in which Plumhoff stated that Rickard "just tried to ram me," Plumhoff testified that Lieutenant Forthman's tape shows where it happened, when it occurred, but "(t)he yellow strobe on my vehicle pretty well washes out the detail." Depo of Plumhoff, at 41. You cannot see the event well on any of the three tapes. Depo of Plumhoff, at 41. You can see the Rickard vehicle come over to the right, but with the yellow strobe, it is hard from the video to determine the exact proximity. Depo of Plumhoff, at 41.

50. Officer Plumhoff testified that his vehicle was going at least seventy miles per hour, when Mr. Rickard's vehicle attempted to ram his. Exhibit C, Plumhoff Depo. 149:14-23.

RESPONSE: Undisputed that Plumhoff provided such testimony; however, as noted above, the accuracy of the assertion that Rickard attempted to ram Plumhoff is respectfully disputed.

51. To avoid having a collision with the Plaintiffs' vehicle, Officer Plumhoff took his foot off the accelerator and tapped his breaks. Exhibit C, Plumhoff Depo. 150:5-17.

RESPONSE: Undisputed that Plumhoff testified that he tapped his brakes to avoid a collision; however, as noted above, the accuracy of the assertion that Rickard attempted to ram Plumhoff is respectfully disputed.

52. Because of the rate of speed, once Officer Plumhoff took his foot off the accelerator his vehicle began to slow down. Exhibit C, Plumhoff Depo. 150:1-4.

RESPONSE: Undisputed that Plumhoff provided such testimony; however, as noted above, the accuracy of the assertion that Rickard attempted to ram Plumhoff is respectfully disputed.

53. After Officer Plumhoff avoided being hit by the white Honda on the right shoulder of I-40, the Honda then quickly crossed over a couple lanes to the left lane and attempted to ram Officer Evans' vehicle as Officer Evans attempted to pass the Plaintiffs in order to perform the road block. Videotape of Unit #279, at 11:11:42.

RESPONSE: The characterization of the content of the video offered by defense counsel as asserted fact is respectfully disputed. Plaintiffs respectfully submit that the activity described is not clearly depicted on the unit 279 video, and whether such activity occurred as characterized should be a question for the jury.

54. Officer Forthman can be heard on the radio saying "he is trying to ram another car." Videotape of Unit #279, at 11:11:42.

RESPONSE: The characterization of the content of the video offered by defense counsel as asserted fact is respectfully disputed as stated. Plaintiffs respectfully submit that the activity described is not clearly depicted on the unit 279 video, and whether such activity occurred as characterized, particularly to the extent the Defendants purport to assess the intent of Mr. Rickard, should be a question for the jury.

55. Officer Evans perceived this as an attempt to ram his car as an attempt by Mr. Rickard to continue his flight. Exhibit I, Affidavit of Jimmy Evans ¶ 11.

RESPONSE: The materiality of this asserted fact, asserting the stated perception of Officer Evans, is disputed. Additionally, Officer Evans is among the officers who have not yet been deposed in this case.

56. James Pearce, a civilian ride-along with Officer Plumhoff during the events, told Memphis Police Department shortly following the events that the Honda had intentionally tried to ram Officer Plumhoff's and then tried to ram Officer Evans' vehicle. Exhibit A, Defendants' Responses to Plaintiffs' Request for Production No. 7 Pearce's Memphis Homicide Witness Statement, Bates No. 001140.

RESPONSE: The materiality of this asserted fact, asserting the stated perception of James Pearce offered to Memphis homicide investigators as to what the driver of the Honda had "intentionally" done, is disputed. Additionally, Mr. Pearce has not been deposed in this case.

57. Using the Videotape of Unit #279, Officer Forthman showed during his deposition exactly where on the video Mr. Rickard can be seen committing the aggravated assault against Officer Evans. Exhibit E, Video of Forthman Deposition, DVD #1 at 11:56:40-11:57:00 and 11:57:52-11:58:18.

RESPONSE: The characterization of the content of the video offered by defense counsel as asserted fact is respectfully disputed. Plaintiffs rely upon their accompanying Memorandum of Law.

58. Officer Evans almost lost control of his vehicle as he attempted to avoid the Plaintiff's vehicle from striking his car. Evans's Memphis Homicide Witness Statement, Bates No. 001143.

RESPONSE: The materiality of this asserted fact, asserting the stated perception of Officer Evans, is disputed. Additionally, again, Officer Evans is among the officers who have not yet been deposed in this case.

59. Officer Forthman saw the vehicle attempt to hit Officer Evans' vehicle and Officer Forthman was the one who stated on the radio that the Honda tried to ram another police car and that there were

aggravated assault charges against the occupants. Exhibit B, Forthman Depo., 99:13-22, 100:10-19.

RESPONSE: The materiality of this asserted fact, asserting the stated perception of Officer Forthman, is disputed. It is undisputed from the unit 279 video that Officer Forthman made the statements attributed to him on the radio; however, it is disputed that the events are properly characterized as attempted rammings. Plaintiffs rely on their accompanying Memorandum of Law. Plaintiffs respectfully submit that the activity described is not clearly depicted on the unit 279 video, and whether such activity occurred as characterized should be a question for the jury.

60. Officer Plumhoff perceived the actions by Mr. Rickard as an attempt to ram his patrol car as a means to continue his unlawful flight. Exhibit C, Plumhoff Depo., 114:18-115:6; Exhibit D, Video of Plumhoff Deposition, DVD #2, 12:32:50-12:33:16.

RESPONSE: The materiality of this asserted fact, asserting the stated perception of Officer Plumhoff, is disputed.

61. Officer Forthman described what he saw and why he deemed the action as being aggravated assault: "He [Mr. Rickard] just happened to be going from one lane to another when he [Mr. Rickard] used his vehicle intentionally to keep or, to even run Officer Evans off the road to keep him [Officer Evans] from going past him [Mr. Rickard]." Exhibit B, Forthman Depo., 102:1-5.

RESPONSE: The materiality of this asserted fact is disputed. The testimony of Forthman that Rickard "just happened to be going from one lane to another" is inextricably bound with the issue of whether that event in fact represents an intentional attempted ramming or a lane change. Plaintiffs rely upon their accompanying Memorandum of Law.

62. Officer Forthman told West Memphis dispatch "We do have aggravated assault charges on him West Memphis advise Memphis that we do have felony charges." Videotape of Unit #279, at 11:11:51.

RESPONSE: Undisputed that the unit 279 video contains such audio from Forthman; however, the materiality of this asserted fact and the accuracy of the assertion that aggravated assault and felony charges were warranted are respectfully disputed. Plaintiffs respectfully submit that the activity described is not clearly depicted on the unit 279 video, and whether such activity occurred as characterized is a question for the jury.

63. Because of the speed and maneuvers made by the Honda, a reasonable officer could conclude this act of fleeing itself was felonious[3].

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[3] Ark. Code Ann. §5-54-125 (2004) states that fleeing in a vehicle is a Class A misdemeanor but fleeing can be a Class D felony if the person creates a risk of "substantial danger of death or serious physical injury to another person."

RESPONSE: This asserted fact is in reality a legal/factual characterization and conclusion and argument of counsel and is respectfully disputed.

64. As Officer Forthman went under the trellis of the I-40 bridge spanning the Mississippi River, Officer Plumhoff can be heard on the radio stating that the Plaintiffs have one more count of aggravated assault. Videotape of Unit #279, at 11:12:34.

RESPONSE: With the understanding that the reference to Plaintiffs is intended to be a reference to Mr. Rickard as the driver of the Honda, it is undisputed on information and belief that such radio traffic is attributable to Officer Plumhoff; however, the accuracy of the content of such radio traffic and therefore the materiality of it as an asserted fact are respectfully disputed. Plaintiffs respectfully submit that the activity described is not clearly depicted on the unit 279 video, and whether such activity occurred as characterized should be a question for the jury.

65. Officer Plumhoff testified as to his reason for making this radio broadcast, "on the bridge I tried to get him – get around him again, and he moved over towards me again to the left that time. I believe at that moment I was in the inside lane and he was in the center lane when he – at that time I hadn't gotten as far up next to him. It was probably – my front wheel would have been about even with his back wheel; and he came over to the left, and I had to drop back again." Exhibit C, Plumhoff Depo., 56:22-24, 57:1-6.

RESPONSE: Undisputed that Plumhoff provided such testimony; however, the materiality of this asserted fact, and the content of such testimony asserted as fact, are respectfully disputed. Plaintiffs respectfully submit that the activity described is not clearly depicted on the unit 279 video, and whether such activity occurred as characterized should be a question for the jury. Plaintiffs rely upon their accompanying Memorandum of Law.

66. These aggravated assault[4] and felony fleeing[5] acts on I-40 occurred in the State of Arkansas. See Exhibit B, Forthman Depo., 65:18-23.

RESPONSE: This asserted fact is in reality a legal/factual characterization and conclusion and argument of counsel and is respectfully disputed.

67. After crossing over into Tennessee, Officer Forthman asked West Memphis dispatch if they had received any response from Memphis Police Department or Shelby County Sheriffs Department. Videotape of Unit #279, at 11:13:14.

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[4] Ark. Code Ann. § 5-13-204 defines aggravated assault as when, "(a) A person commits aggravated assault if under the circumstances manifesting extreme indifference to the value of human life, he or she purposely: (1) Engages in conduct that creates a substantial danger of death or serious physical injury to another person ... (b) Aggravated assault is a Class D felony."

[5] See Ark. Code Ann. § 5-5-54-125.

RESPONSE: Undisputed that Forthman used the words "what about Memphis and Shelby County?" or words to that effect.

68. The officers proceeded into Tennessee because Arkansas adopted the "Uniform Act on Interstate Fresh Pursuit," with a stated purpose as "[t]he purpose of this subchapter is to prevent criminals from utilizing state lines to handicap our police in their apprehension." Ark. Code Ann. §16-81-402.

RESPONSE: This asserted fact is in reality a legal/factual characterization and conclusion and argument of counsel and is respectfully disputed.

69. A few seconds later, the white Honda made a quick and dangerous exit off of I-40 onto Danny Thomas Blvd., Memphis, TN. Videotape of Unit #279, at 11:13:20.

RESPONSE: This asserted fact is in reality a legal/factual characterization and conclusion and argument of counsel and is respectfully disputed. It is undisputed, however, that the Honda turned and exited off of I-40 onto Danny Thomas Boulevard in Memphis.

70. In order to exit at Danny Thomas Blvd., Mr. Rickard cut to the right crossing about two lanes of traffic, almost colliding with a civilian vehicle pulling a boat. Videotape of Unit #279, at 11:13:20-23.

RESPONSE: This asserted fact is in reality a legal/factual characterization and conclusion and argument of counsel and is respectfully disputed. A

review of the tape at or about the time set forth by the Defendants reveals that one or more officers nearly struck the civilian pulling the boat, and that seconds later clustered pursuing officers effectively straddled another vehicle which had stopped or slowed in the middle lane of traffic, passing it on the right and left, which the jury could find to be dangerous driving by officers during the pursuit. Unit 279 video, at 11:14:06-:08.

71. The pursuit was only momentarily on Alabama Ave. before the Honda turned right onto Danny Thomas Blvd[6]. Exhibit C, Plumhoff Depo., 60:2-4; Videotape of Unit #279, at 11:13:36-43.

RESPONSE: Undisputed as stated.

72. A misconception has developed in the media about the radio traffic that occurred about at this stage of the pursuit. (Officer Plumhoff comments on the radio that the officers needed to end the pursuit, to which Officer Evans responds with a question about terminating the pursuit.) Officer Plumhoff clarifies by instructing Officer Evans to get in front of the white Honda. Officer Plumhoff was instructing Officer Evans to physically put an end to the pursuit

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[6] The eastbound I-40 exit at Danny Thomas Blvd. is a partial cloverleaf, which allows access to either Alabama Ave., through a tangent, or to Danny Thomas Blvd. by continuing on the circumference of the partial cloverleaf. Exhibit C, Plumhoff Depo. 59:16-24, 60:1-2; *see also,* Videotape of Unit #279, at 11:13:24.

by stopping the white Honda, as opposed to calling off the pursuit. Videotape of Unit #279, at 11:13:35-11:13:56.

RESPONSE: The materiality of this asserted fact is respectfully disputed. Whether there has been a media misconception about the content of police radio traffic is not material to the instant motion. Plaintiffs note that a review of the unit 279 video makes clear that a voice asks "terminate the pursuit?", and another voice responds "Negative. See if you can get in front of him." Additionally, Plumhoff testified that Officer Evans asked Plumhoff about terminating the pursuit in Tennessee, and Plumhoff told him not to terminate. Depo of Plumhoff, at 22-23. No one countermanded Plumhoffs instruction not to terminate. Depo of Plumhoff, at 23. That was the only time anyone asked about whether to terminate the pursuit. Depo of Plumhoff, at 23.

73. One of the Officers, tells Officer Evans to "see if you can get in front of him" in order to box the Plaintiffs in and as peacefully as possible terminate the pursuit. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.8 attached Videotape of Unit #284, 12:16:37[7] (hereinafter Videotape of Unit #284).

RESPONSE: This asserted fact is undisputed and disputed in part. It is undisputed from a

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[7] The footage of Videotape of Unit #284 was captured in black and white.

review of the unit 279 video, as noted in response to the preceding factual statement, that Sergeant Plumhoff told Evans "see if you can get in front of him." However, the remainder of this asserted fact is in reality a legal/factual characterization and conclusion and argument of counsel and is respectfully disputed.

74. While the pursuit was on Danny Thomas Blvd., Officer Galtelli was one of the last, if not the last, officer in the pursuit; therefore, the dashboard video from his vehicle provides a view of most, if not all, the police cars and the Plaintiffs' car in the pursuit. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.8 attached Videotape of Unit #286, at 12:17:22-33[8] (hereinafter Videotape of Unit #286).

RESPONSE: On information and belief, undisputed as stated.

75. As the white Honda approached Jackson Ave., the vehicle was in the middle lane. Videotape of Unit #286, at 12:17:30; Videotape of Unit #279, at 11:14:08; Evans's Memphis Homicide Witness Statement, Bates No. 001143.

RESPONSE: Disputed as stated. The time attributed to the counter on unit 279 does not appear to correspond to the activity depicted at that time.

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[8] The Videotape of Unit #286 has no audio, which has been recognized by both parties. *See* Exhibit C, Plumhoff Depo.,136:1-5.

76. From this center-lane position, the Honda made a quick right turn onto Jackson Ave., whereby contact occurred between Officer Evans's vehicle and the Plaintiffs' vehicle. Videotape of Unit #286, at 12:17:34; Evans's Memphis Homicide Witness Statement, Bates No. 001143.

RESPONSE: Undisputed that after the right turn onto Jackson Avenue, contact occurred between the Rickard vehicle and a police vehicle, presumably Evans.

77. The contact caused the Plaintiffs' vehicle to spin around into a parking lot at the intersection of Danny Thomas Blvd. and Jackson Ave. Videotape of Unit #286, at 12:17:35; Evans's Memphis Homicide Witness Statement, Bates No. 001143.

RESPONSE: Undisputed that this contact between the Rickard vehicle and the police vehicle caused the Rickard vehicle to spin out as set forth and as depicted at or near the time stated on the unit 286 video. It is respectfully submitted that the video demonstrates that the contact that caused the spin-out also caused the Rickard vehicle to continue to have forward momentum after spinning out which led to later contact between the Rickard vehicle and the police vehicle driven by Officer Plumhoff, which was also moving forward.

78. Officer Jimmy Evans explained, "[a]s we were coming up on Jackson the suspect he went wide like he was going to get in the center lane then he made a right hand turn. I tried to cut to the inside of

the turn in another attempt to get in front of him. At that time he locked the car up, and I applied my brakes, and started skidding, the left front of my vehicle skidded into the right rear of the suspect's vehicle. He spun out into the parking lot at the corner of Jackson and Danny Thomas." Evans's Memphis Homicide Witness Statement, Bates No. 001143; Exhibit I, Affidavit of Jimmy Evans ¶¶ 14-15.

RESPONSE: Undisputed that the statement and Affidavit of Evans contain such content; however, Officer Evans is among those officers who have yet to be deposed in this case.

79. As a result of the impact, Officer Evan's vehicle, Unit # 205, totally lost its front driver-side headlight, sustained a severe indentation of the front driver-side quarter panel, and a noticeable crumpling of the patrol car's hood. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.8 attached Pictures of Unit #205, Bates Nos. 002009-002016.

RESPONSE: This asserted fact is in reality a legal/factual characterization and conclusion and argument of counsel and is respectfully disputed. The photographs of the vehicles speak for themselves and on information and belief, do reflect vehicle damage from contact between the Rickard vehicle and the police vehicle.

80. When Officer Plumhoff saw the Honda spinout, he turned right into the parking lot in order to get in front of suspects' vehicle. Exhibit C,

Plumhoff Depo., 65:9-12; Videotape of Unit #286, at 12:17:36.

RESPONSE: Undisputed that Plumhoff provided such testimony and that the described movement to the right of Officer Plumhoff's vehicle appears to be depicted on the video of unit 286 at or near the time stated.

81. Officer Plumhoff testified that when he first entered the parking lot the Honda was a little offset in front of Officer Plumhoff's vehicle with the Plaintiffs' right front fender pointing towards Officer Plumhoff. Exhibit C, Plumhoff Depo., 65:13-14, 16-18.

RESPONSE: Undisputed that Plumhoff provided such testimony.

82. After the Honda spunout, the Honda then accelerated forwards and rammed into Officer Plumhoff's vehicle. Videotape of Unit #286, at 12:17:37; Exhibit C, Plumhoff Depo., 140:12-15; Exhibit B, Forthman Depo., 134:10-19.

RESPONSE: Disputed as stated. Rather than depicting the asserted "ramming," the video from unit 286 appears to depict the Rickard vehicle still moving forward from the momentum imparted by the spinout after contact with the vehicle of Officer Evans, and colliding with the vehicle of Officer Plumhoff, which is also moving forward. Plumhoff testified that he believes the impact between the Rickard vehicle and the Sergeant. Plumhoff to vehicle does not show on the [unit 279] video. Depo of

Plumhoff, at 118. Plumhoff believes that impact is partially shown on the camera of officer Galtelli [which is unit 286]. Depo of Plumhoff, at 119. From reviewing the video, when the Rickard vehicle spins out, Plumhoff cannot tell which car hits which car. Depo of Plumhoff, at 141. Plumhoff does not know whether Rickard hits other police vehicles or they hit him, but he spun out subsequent to some contact between vehicles. Plumhoff knows that. Depo of Plumhoff, at 142. Plumhoff is not certain regardless of who initiated contact, whether that spinout included its momentum of coming toward Plumhoff. Depo of Plumhoff, at 143.

83. As the Plaintiffs started to accelerate towards Officer Plumhoff, Mr. Rickard turned the vehicle more towards Officer Plumhoff's vehicle and Officer Plumhoff perceived this as Rickard's attempt to cause a greater impact with Officer Plumhoff. Exhibit C, Plumhoff Depo., 65:18-20.

RESPONSE: With the understanding that the reference to Plaintiffs is intended to refer to Donald Rickard and Kelly Allen, it is undisputed that Officer Plumhoff provided such testimony, but the accuracy of the stated perception of Officer Plumhoff is disputed as stated, and the materiality of this asserted fact is disputed. Additionally, the video from unit 279 does not appear to substantiate this asserted perception.

84. Officer Plumhoff testified that he applied his brakes and warned his civilian ride-along, James

Pearce, that they were about to have a collision. Exhibit C, Plumhoff Depo., 65:24-66:1, 74:15-21.

RESPONSE: Undisputed that Plumhoff provided such testimony; however, the materiality of this asserted fact is respectfully disputed.

85. The collision between Officer Plumhoff and the Honda was a straight head-on collision with the impact being flush across the front of Officer Plumhoff's vehicle. Exhibit C, Plumhoff Depo., 65:9-12.

RESPONSE: Undisputed that Plumhoff provided such testimony; however, the materiality of this asserted fact is respectfully disputed.

86. The collision is captured on the Videotape of Unit #286. 12:17:37.

RESPONSE: Undisputed as stated that the collision is captured on the video of unit 286; however, as noted above, the video appears to show the Rickard vehicle still moving forward from the momentum imparted by the spinout after contact with the vehicle of Officer Evans, and colliding with the vehicle of Officer Plumhoff, which is also moving forward.

87. The impact was so severe that Officer Plumhoff thought his vehicle was disabled. Officer Plumhoff believed his car was disabled based on the shall [sic], impact of the collision, and the force of the collision. Exhibit C, Plumhoff Depo., 66:7-9; 76:16-23.

RESPONSE: Undisputed that Plumhoff provided such testimony; however, the materiality of this asserted fact is respectfully disputed. The unit 286 video appears to show the Rickard vehicle still moving forward from the momentum imparted by the spinout after contact with the vehicle of Officer Evans, and colliding with the vehicle of Officer Plumhoff, which is also moving forward, rather than an asserted "ramming." Plumhoff testified that he believes the impact between the Rickard vehicle and the Sergeant. Plumhoff to [sic] vehicle does not show on the [unit 279] video. Depo of Plumhoff, at 118. Plumhoff believes that impact is partially shown on the camera of officer Galtelli [which is unit 286]. Depo of Plumhoff, at 119. From reviewing the video, when the Rickard vehicle spins out, Plumhoff cannot tell which car hits which car. Depo of Plumhoff, at 141. Plumhoff does not know whether Rickard hits other police vehicles or they hit him, but he spun out subsequent to some contact between vehicles. Plumhoff knows that. Depo of Plumhoff, at 142. Plumhoff is not certain regardless of who initiated contact, whether that spinout included its momentum of coming toward Plumhoff. Depo of Plumhoff, at 143.

88. Officer Plumhoff's vehicle, Unit #290, suffered a collapsed grill guard, moderate damage to the front driver-side headlight, and moderate displacement of the vehicle's hood. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.8 attached Pictures of Unit #290, Bates Nos. 002017-002027.

RESPONSE: This asserted fact is in reality a legal/factual characterization and conclusion and argument of counsel and is respectfully disputed. The photographs of the vehicles speak for themselves and on information and belief, do reflect vehicle damage from contact between the Rickard vehicle and the police vehicle.

89. The impact was so severe that Officer Plumhoff sought medical attention for injuries to his neck as a result of the impact. Exhibit A, Defendants' Responses to Plaintiffs' Requests for Production, No.5 Plumhoff Medical Records Bates Nos. 000714-000722.

RESPONSE: Although the term "severe" is a characterization of counsel and is therefore disputed to the extent contradicted by the video of unit 286, it is undisputed that Officer Plumhoff sought medical attention as reflected in the cited records, which reveal that his x-rays were normal, but soft tissue or contusive injury was considered possible. Bates page 000716.

90. At or near this stage of events, the other police officers formed a semicircle around the Rickard vehicle in an attempt to use the building in the lot to prevent the Honda from continuing to flee and continuing to endanger others; (starting from the left when facing the Plaintiffs), Officer Evans was directly on Plaintiffs' front passenger corner, Officer Forthman was at the back passenger-side of Officer Evans's vehicle, then Officer Plumhoff was next to the right, and Officer Gardner was nose to nose with the

Plaintiffs' vehicles [sic]. Videotape of Unit #279, 11:14:21; Exhibit B, Forthman Depo., 117:11-21, 119:16-21; Exhibit C, Plumhoff Depo., 119:19-23.

RESPONSE: Again, with the understanding that the references in this asserted fact to the Plaintiffs are intended to refer to the decedents Donald Rickard and Kelly Allen rather than the actual named Plaintiffs in these consolidated cases, undisputed as stated.

91. Officer Galtelli pulled between Officer Gardner and the building. Videotape of Unit #286, 12:17:43.

RESPONSE: Disputed as stated only to the extent that the unit 286 video appears to depict Officer Galtelli as being to the right of Officer Gardner and to the side of the building, rather than between Officer Gardner and the building. It is denied that this asserted fact is material.

92. Officer Ellis pulled his vehicle behind Officer Plumhoff and to the right-rear of Officer Forthman's vehicle after the suspects' vehicle rammed Officer Plumhoff. Videotape of Unit #284, 12:17:00.

RESPONSE: Disputed as stated to the extent this asserted fact contains another indication that the Rickard vehicle "rammed" Officer Plumhoff.

93. Because of the building and the location of the police cars, the only unobstructed means for the Plaintiffs to escape was to backup. Exhibit C,

Plumhoff Depo., 63:16-23, 64:5-7; Videotape of Unit #279, at 11:14:17; Exhibit B, Forthman Depo., 118:5-10.

RESPONSE: Undisputed, on information and belief.

94. In an attempt to escape, Mr. Rickard reversed his vehicle away from Officer Plumhoff's vehicle. Videotape of Unit #279, at 11:14:18; Videotape of Unit #286, at 12:17:41.

RESPONSE: Undisputed, on information and belief and a review of the referenced videos.

95. As the Honda was reversing, Officer Evans and Officer Plumhoff exited their vehicles and approached the Plaintiffs' vehicle. Videotape of Unit #279, at 11:14:20; Videotape of Unit #286, at 12:17:42; Videotape of Unit #284, at 12:11:01.

RESPONSE: Disputed as stated only to the extent that the asserted activities do not appear to occur at the times stated for units 286 and 284; however, it is not disputed that Officers Plumhoff and Evans exited their vehicles and approached the Rickard vehicle prior to the shooting of Donald Rickard and Kelly Allen.

96. Officer Evans arrived at the Plaintiffs' vehicle before the other officers. Exhibit C, Plumhoff Depo., 82:15-20.

RESPONSE: Undisputed that Plumhoff provided such testimony; however, the materiality of this asserted fact is respectfully disputed.

97. Officer Evans tried to gain entrance into the vehicle by pounding on the passenger-side window and windshield with his gun in hand. Videotape of Unit #279, at 11:14:21; Videotape of Unit # 286, at 12:17:42; Videotape of Unit #284, at 12:17:01; Evans's Memphis Homicide Witness Statement, Bates No. 001143; Exhibit B, Forthman Depo., 119:22-24, 120:11-19, 154:8-15; Affidavit of Jimmy Evans ¶16.

RESPONSE: Undisputed, on information and belief.

98. Simultaneously, Officer Plumhoff and Officer Gardner[9] exited their respective vehicles and headed towards the white Honda. Videotape of Unit #279, at 11:14:21; Exhibit B, Forthman Depo., 121:8-20; Exhibit C, Plumhoff Depo., 120:19-21.

RESPONSE: Undisputed, on information and belief.

99. Officer Plumhoff approached with his firearm in his hands. Videotape of Unit #279, at 11:14:22; Exhibit C, Plumhoff Depo., 120:3-14; Exhibit B, Forthman Depo., 120:20-24, 121:1-5.

RESPONSE: Undisputed.

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[9] Officer Gardner is the only West Memphis Police Officer who was wearing a baseball-style cap in the videos.

100. As other officers approached, the Plaintiffs' vehicle stopped reversing and drove forward striking Officer Gardner's vehicle. Videotape of Unit #279, at 11:14:22-24; Videotape of Unit #286, at 12:17:43-46; Exhibit C, Plumhoff Depo., 125:9-12, 127:21-128:1; Exhibit H, Affidavit of John Gardner ¶ 18.

RESPONSE: Disputed as stated to the extent that a review of the videos appears to demonstrate that the Rickard vehicle rocked back and forth, but did make contact with Officer Gardner's vehicle.

101. On Unit Video #286, the suspects' car can be seen spinning its front wheels and repeatedly ramming Officer Gardner's patrol car. 12:17:43-12:17:46.

RESPONSE: Disputed as stated to the extent that it is asserted the vehicle repeatedly rammed Officer Gardner; however, it is undisputed that the video does depict spinning of the front wheels and apparent contact with Officer Gardner's vehicle.

102. In fact on Videotape of Unit #279, the Plaintiffs' engine can be heard revving. Videotape of Unit #279, at 11:14:23; Exhibit H, Affidavit of John Gardner ¶ 20.

RESPONSE: The characterization of counsel, offered as undisputed fact, is disputed as stated. The video does appear to depict the vehicle rocking back and forth, but whether a vehicle engine noise in conjunction with a rocking motion is properly characterized as a "revving" should be a question for the

jury, particularly to the extent this characterization is offered as a justification for the first use of deadly force in this incident. With regard to the citations to the Affidavit of Officer Gardner, as noted above, Officer Gardner has yet to be deposed in this case.

103. Almost simultaneously, Officer Plumhoff fired three shots into the vehicle towards Mr. Rickard. Videotape of Unit #279, at 11:14:24; Videotape of Unit #286, at 12:17:46.

RESPONSE: Undisputed that at or near the times stated, the videos depict Officer Plumhoff firing three gunshots into the vehicle; however, the unit 279 video also depicts that Officer Plumhoff was more to the passenger side of the vehicle than in front of the vehicle, notwithstanding his testimony indicating that he believed the front of the vehicle was facing him at the time.

104. In an emotional remembrance, Officer Plumhoff testified as to why he fired his weapon:

> I heard the engine start to race and tires barking, squealing, . . . , and it just kind of hit me all at once. It was like – like, oh, God; but I had my front sights pretty much lined up on his [Mr. Rickard's] chest. I remember that part just as clear as a bell, and I just – it was like, oh, God, I'm about to get killed; and I squeezed. I remember firing three rounds . . . I had no doubt as to how many rounds I had fired; and I knew he was hit, because he snapped over to the left and then immediately

just sat right back up and looked, looked forward.

Exhibit D, Video of Plumhoff Deposition, DVD #2, at 11:18:32-11:20:02; Exhibit C, Plumhoff Depo., 67:6-19.

RESPONSE: Undisputed that Plumhoff provided such testimony; however, the degree of threat Plumhoff identified as perceiving from these events, and therefore the materiality of this asserted fact, are both respectfully disputed. Plaintiffs rely upon the legal and factual arguments set forth in their accompanying Memorandum of Law as to the objective reasonableness of this course of action in response to the situation.

105. Upon hearing the gunfire, Officer Galtelli believed that the shots had been fired from inside the white Honda towards one of his fellow officers. Exhibit G, Affidavit of Troy Galtelli ¶17.

RESPONSE: In response to this asserted fact, Plaintiffs can neither dispute nor accept it as undisputed because Officer Galtelli has yet to be deposed; the video of unit 279 and testimony in the record reveal that all 15 of the gunshots fired that night were fired by Officers Plumhoff, Gardner and Galtelli, and the materiality of Officer Galtelli's subjective belief as stated in an Affidavit without further discovery is therefore respectfully disputed for purposes of the instant motion.

106. Officer Ellis, upon hearing the shots, did not know whether an officer or the suspects fired the shots. Exhibit F, Affidavit of Lance Ellis ¶14.

RESPONSE: In response to this asserted fact, Plaintiffs can neither dispute nor accept it as undisputed because Officer Ellis has yet to be deposed; the video of unit 279 and testimony in the record reveal that all 15 of the gunshots fired that night were fired by Officers Plumhoff, Gardner and Galtelli, and the materiality of Officer Ellis's lack of knowledge as to who had fired shots as stated in an Affidavit without further discovery is therefore respectfully disputed for purposes of the instant motion.

107. Realizing that the Honda's driver was going to try to escape through the rear opening, Officer Forthman reversed his vehicle in an attempt to block the escape. Videotape of Unit #279, at 11:14:24; Videotape of Unit #284, at 12:17:05; Exhibit B, Forthman Depo., 126:23-24, 127:21-24; Exhibit E, Video of Forthman Deposition, DVD #2 at 12:29:34-36[10]; Forthman's Memphis Homicide Witness Statement, Bates No. 001132.

RESPONSE: Undisputed, on information and belief.

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[10] Officer Forthman was asked to show on Videotape of Unit #279 when he made the decision to block the egress route; however, the [sic] no record was made of the timestamp on dashboard video beyond what is visible on video of Forthman's deposition.

108. The Honda then reversed in a 180 degree arc onto Jackson Ave. heading east. Videotape of Unit #279, at 11:14:25-29; Videotape of Unit #286, at 12:17:47-51; Videotape of Unit #284, at 12:17:08-10; Forthman's Memphis Homicide Witness Statement, Bates No. 001132.

RESPONSE: Undisputed, based upon a review of the videos. Additionally, Officer Forthman testified that we know [from the video in Forthman's car] that basically all of the ten shots fired by Gardner were during the time the car was moving forward [which was away from the officers]. Depo of Forthman, at 158. When that car starts going in the other direction [forward], it is not a threat to the people who are behind the car. Depo of Forthman, at 158. Forthman can agree that Mr. Rickard did not have a gun that night, nor did Ms. Allen. Depo of Forthman, at 187. None of the officers that night said to Forthman that they were armed or they pulled a gun or it looked like they were going to shoot the officers. Depo of Forthman, at 188.

109. During these events, the Honda struck Officer Evans' right hand. Exhibit I, Affidavit of Jimmy Evans ¶ 16.

RESPONSE: Undisputed that the Affidavit of Officer Evans contains such content; however, the videos do not appear to depict the contact described by Officer Evans, and the materiality of this asserted fact is respectfully disputed. Again, Plaintiffs note

that Officer Evans is among the officers who have yet to be deposed in this case.

110. As the Honda was reversing, Officer Galtelli exited his vehicle and ran to join the other officers, who were chasing the vehicle as it maneuvered on Jackson Ave. Videotape of Unit #286, at 12:17:49; Videotape of Unit #279, at 11:14:27.

RESPONSE: Undisputed, on information and belief.

111. As the Honda reversed onto Jackson Ave., Officer Ellis was standing to the rear passenger-side of the Plaintiffs vehicle and had to quickly move to avoid being hit by the Honda. Videotape of Unit #279, at 11:14:28; Exhibit F, Affidavit of Lance Ellis ¶15; Exhibit E, Video of Forthman Deposition, DVD #2 at 1:03:48-1:04:10; Exhibit B, Forthman Depo., 152:5-20.

RESPONSE: The characterization of counsel offered as undisputed fact is respectfully disputed, particularly to the extent such asserted fact is offered or may be offered as a justification for the use of deadly force under the circumstances, when the reasonableness of the use of deadly force under the circumstances should be a question for the jury. The unit 279 video appears to demonstrate that Officer Ellis had to take only one step to his right to avoid the Rickard vehicle. Again, Plaintiffs note that Officer Ellis is among the officers who have yet to be deposed in this case.

112. Officer Gardner had his gun out as he and other officers fanned out to attempt to end the pursuit on Jackson Ave. Videotape of Unit #279, at 11:14:30; Exhibit H, Affidavit of John Gardner ¶23.

RESPONSE: Undisputed, on information and belief; again, however, Plaintiffs note that Officer Gardner is among the officers who have yet to be deposed in this case.

113. Officer Gardner observed Mr. Rickard look down the road and then put the vehicle in drive, which caused Officer Gardner to believe that the officer to his right was in imminent danger because that officer was in the direct path that the Honda was about to take. Exhibit H, Affidavit of John Gardner ¶¶ 24-26; Videotape of Unit #279, at 11:14:30.

RESPONSE: Disputed on several bases. Notwithstanding the statement of Officer Gardner in his Affidavit that he believed the officer to his right was in imminent danger and in the direct path the Honda was about to take, a review of the Unit 286 video at or near 12:17:53 clearly demonstrates that the officer to Officer Gardner's right was not in the direct path the Honda was about to take, as that officer was either even with or behind and to the right of Officer Gardner. Additionally, as noted above, Officer Gardner has yet to be deposed in this case. The statements made by Officer Gardner in his Affidavit have yet to be subject to cross examination. As set forth in factual statement number 114 of the Defendants, Officer Gardner fired ten shots toward

the vehicle. Most if not all of those shots were fired as the vehicle was passing or indeed already past the officers. Plaintiffs rely upon the legal and factual arguments set forth in their accompanying Memorandum of Law as to the objective reasonableness of this course of action in response to the situation.

114. In order to protect his fellow officers and stop the driver from harming others, Officer Gardner fired ten shots towards the driver. Videotape of Unit #279, at 11:14:31-32; Videotape of Unit #284, at 12:17:11; Videotape of Unit #286, at 12:17:53; Exhibit E, Video of Forthman Deposition, DVD #2 at 12:40:28-59, 1:04:51-1:04:57; Exhibit B, Forthman Depo, 131:11-24, 153:17-24, 154:1-5; Exhibit C, Plumhoff Depo., 132:19-24, 133:5-19, 134:2-4; Exhibit A, Defendants' Responses to Interrogatories, No. 7.

RESPONSE: It is undisputed that Officer Gardner fired ten shots, but disputed as stated that they were toward the driver specifically. Respectfully, a review of the cited videos demonstrates that Officer Gardner's shots were more directed toward the vehicle itself generally, but fired from the passenger side initially and then from behind the vehicle as the vehicle sped away and Officer Gardner continued to fire at the moving vehicle as the vehicle went down the street away from the officers. As to the stated justifications for this action, Plaintiffs rely upon the legal and factual arguments set forth in their accompanying Memorandum of Law as to the objective reasonableness of this course of action in response to the situation. Additionally, Officer Forthman testified

that we know [from the video in Forthman's car] that basically all of the ten shots fired by Gardner were during the time the car was moving forward [which was away from the officers]. Depo of Forthman, at 158. When that car starts going in the other direction [forward], it is not a threat to the people who are behind the car. Depo of Forthman, at 158. Forthman can agree that Mr. Rickard did not have a gun that night, nor did Ms. Allen. Depo of Forthman, at 187. None of the officers that night said to Forthman that they were armed or they pulled a gun or it looked like they were going to shoot the officers. Depo of Forthman, at 188.

115. Officer Gardner's department-issued weapon had fifteen rounds in the magazine plus one round in the chamber for a total of sixteen rounds. Exhibit H, Affidavit of John Gardner ¶ 29.

RESPONSE: Undisputed that Officer Gardner's Affidavit contains such a statement. Plaintiffs deny the materiality of this asserted fact and note again that Officer Gardner is among those officers who have yet to be deposed in this case.

116. In addition to Officer Plumhoff and Officer Gardner, Officer Galtelli also fires two shots towards the driver in an attempt to stop the threat of serious bodily injury or death posed by the Plaintiffs to himself, fellow officers, and the public. Exhibit A, Defendants' Responses to Interrogatories, No. 7; Exhibit G, Affidavit of Troy Galtelli ¶ 18.

RESPONSE: Undisputed, on information and belief, that Officer Galtelli fired two shots; however, the remainder of this asserted fact, and its materiality, are respectfully disputed to the extent the video from unit 279 depicts the shots as being fired more generally toward the White Honda, well after the Honda had gone past the officers and proceeded down the street away from the officers. Plaintiffs rely upon the legal and factual arguments set forth in their accompanying Memorandum of Law as to the objective reasonableness of this course of action in response to the situation. Additionally, Officer Forthman testified that we know [from the video in Forthman's car] that basically all of the ten shots fired by Gardner were during the time the car was moving forward [which was away from the officers]. Depo of Forthman, at 158. When that car starts going in the other direction [forward], it is not a threat to the people who are behind the car. Depo of Forthman, at 158. Forthman can agree that Mr. Rickard did not have a gun that night, nor did Ms. Allen. Depo of Forthman, at 187. None of the officers that night said to Forthman that they were armed or they pulled a gun or it looked like they were going to shoot the officers. Depo of Forthman, at 188.

117. Officer Forthman testified "we [the West Memphis Police Officers] don't shoot to kill. We shoot to stop a threat." Exhibit B, Forthman Depo, 159:11-13.

RESPONSE: Undisputed that Forthman provided such testimony; however, the materiality of such testimony is respectfully disputed.

118. Even as the Officers were shooting, Mr. Rickard continued to flee down Jackson Ave. Videotape of Unit #279, at 11:14:31; Videotape of Unit #284, at 12:17:11; Videotape of Unit #286, at 12:17:53.

RESPONSE: Undisputed. Plaintiffs rely upon the legal and factual arguments set forth in their accompanying Memorandum of Law as to the objective reasonableness of this course of action in response to the situation.

119. Officer Plumhoff, Officer Gardner, and Officer Galtelli, each did not intend to shoot the passenger, Kelly Allen. *SUMF* ¶ 111 (specifically citing Exhibit C, Plumhoff Depo., 67:9-10); Exhibit H, Affidavit of John Gardner ¶ 27; Exhibit G, Affidavit of Troy Galtelli ¶ 22.

RESPONSE: The Rickard Plaintiffs neither dispute nor accept this asserted fact as undisputed, as this asserted fact is not directed toward Donald Rickard or the Rickard Plaintiffs by extension.

120. Based on the video timestamps from Videotape of Unit #279, all these events described in paragraphs 100 to 118 occurred within a matter of seconds. 11:14:20-11:14:34.

RESPONSE: Undisputed, but the materiality of this asserted fact is respectfully disputed.

121. Officer Forthman pursued the Plaintiffs as they fled down Jackson Ave. for several blocks until the Plaintiffs' vehicle crashed into a building at the corner of Jackson Ave. and Manassas St. Videotape of Unit #279, at 11:14:33-11:14:51.

RESPONSE: Disputed as stated only to the extent that the videos from unit 279 and 284 reveal a path of travel prior to the crash which is not properly characterized as "several" blocks.

122. When Inspector Eddy West[11] arrived on the scene, Officer Forthman informed him as to the events, "[w]recked out that was their car, wrecked-out down here, no he wrecked out. They tried to position their car to keep him from running, he rammed the car. Think guys came around and he backed up on the guys going around, and I remember seeing Gardner, he starts shooting, Gardner shot because he's protecting I guess the guys behind and Vance also shot his weapon." Videotape of Unit #279, at 11:16:43-57, 11:19:51-11:20:26; Exhibit B, Forthman Depo., 141:4-8, 148:17-24, 149:1-16.

RESPONSE: Undisputed that Forthman used either the quoted words or substantially similar words on the Unit 279 video; however, the materiality of this asserted fact is respectfully disputed. Plaintiffs rely upon the legal and factual arguments set forth in

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[11] Because Chief Paudert was out-of-town, Inspector Eddy West was the highest ranking West Memphis Police Officer available. *See* Exhibit B, Forthman Depo., 62:15-21.

their accompanying Memorandum of Law as to the objective reasonableness of the courses of action which preceded these statements and all of the events which form the basis of this lawsuit.

Respectfully Submitted,

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PETITIONER'S BRIEF

RECORD
AND
BRIEFS

No. 12-1117

Supreme Court, U.S.
FILED
DEC 30 2013
OFFICE OF THE CLERK

In The

Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' BRIEF

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit wrongly denied qualified immunity to Petitioners by analyzing whether the force used in 2004 was distinguishable from factually similar force ruled permissible three years later in *Scott v. Harris*, 550 U.S. 372 (2007). Stated otherwise, the question presented is whether, for qualified immunity purposes, the Sixth Circuit erred in analyzing whether the force was *supported* by subsequent case decisions as opposed to *prohibited* by clearly established law at the time the force was used.

2. Whether the Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law when, under Respondent's own facts, the suspect led police officers on a high-speed pursuit that began in Arkansas and ended in Tennessee, the suspect weaved through traffic on an interstate at a high rate of speed and made contact with the police vehicles twice, and the suspect used his vehicle in a final attempt to escape after he was surrounded by police officers, nearly hitting at least one police officer in the process.

RULES 24.1(b) AND 29.6 STATEMENT

Plaintiffs (respondents here) are a minor W.R., Individually, and as Surviving Daughter of Donald Rickard, Deceased, by and Through Her Mother Samantha Rickard, as Parent and Next Friend.

Defendants (Petitioners here) are West Memphis, Arkansas Police Officers Vance Plumhoff, John Bryan Gardner, Troy Galtelli, Lance Ellis, Jimmy Evans, and Joseph Forthman.

There is a consolidated case in the district court where the plaintiffs are the Estate of Kelly Allen, Deceased, Clayton David Allen, a minor M.N.A. and minor A.L.A. The defendants in that case are the same as here, plus the City of West Memphis and Mayor William H. Johnson and Chief of Police Robert Paudert.

There are no corporations as a party to this case.

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The amended opinion of the court of appeals (Pet. App. 1) is reported as *Estate of Allen v. City of West Memphis*, 509 Fed. Appx. 388 (6th Cir. 2012).

The district court's opinion in the consolidated cases (Pet. App. 16) is reported as *Estate of Allen v. City of West Memphis*, Nos. 05-2489, 05-2585, 2011 WL 197426, 2011 U.S. Dist. LEXIS 5606 (W.D. Tenn., Jan. 19, 2011).

JURISDICTION

The first opinion of the court of appeals was October 9, 2012. Petitioners filed a petition for rehearing en banc which was denied on November 14, 2012, but the opinion was modified and a concurring opinion was added. Pet. App. 1. Rehearing was finally denied December 13, 2012. Pet. App. 63.

This Court's jurisdiction is based on 28 U.S.C. §§ 1254(1), 1291; *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

A. Introduction

This case involves a demonstrably dangerous car chase of Respondent's decedent, Donald Rickard, by Petitioners who were police officers of the City of West Memphis, Arkansas, on the night of July 18-19, 2004. Near the end of this chase, Rickard's car spun out and came to a near stop in a parking lot in downtown Memphis, Tennessee. Three of the officers used

deadly force only after Rickard repeatedly rammed a police car in front of him and then drove in reverse in the direction of officers on foot trying to arrest him. Rickard was shot and his passenger, Ms. Allen, was struck by a bullet fragment. The car finally ran off the left side of the road and crashed. Tragically, both Rickard and Allen were killed.

Two suits were filed, one each by the estates of the driver and passenger. The Petitioners filed a third-party claim against the Estate of Rickard in response to the suit filed by the Estate of Allen, the Passenger's Estate. The two suits were consolidated by the district court. After discovery, the officers moved for summary judgment because it was not clearly established that the use of deadly force to end this dangerous high-speed chase was objectively unreasonable. The undisputed material facts came from depositions, affidavits, statements to the Memphis Police Department, and three video recordings ("dash-cam" videos) of the entire chase and shooting. The district court denied summary judgment based on qualified immunity[1] to the officers, and the U.S. Court of Appeals for the Sixth Circuit affirmed, holding that it "cannot conclude that the officers'

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[1] However, the district court granted Petitioners' motion as it related to the federal claims made by the Estate of Allen. Petitioners took an interlocutory appeal from the denial of qualified immunity as to the federal claims made by the Estate of Rickard, which is why only that portion of the case is before the Court.

conduct was reasonable as a matter of law." Pet. App. 12.

The Sixth Circuit failed to properly apply this Court's qualified immunity jurisprudence in numerous respects. It assessed Petitioners' behavior based on decisions by this Court several years *after* the underlying incident; it defined clearly established law at "too high a level of generality"; and it collapsed the Fourth Amendment reasonableness inquiry with the qualified immunity inquiry. When properly applied, Petitioners are entitled to qualified immunity because it was not "beyond debate" in July of 2004 that their use of deadly force to end the threat posed during this dangerous high-speed police chase violated a clearly established constitutional rule. The Sixth Circuit also erred in holding that Petitioners' use of deadly force violated the Fourth Amendment. Their actions were objectively reasonable under *Scott v. Harris*, 550 U.S. 372 (2007), *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), because Rickard committed felony fleeing and aggravated assault in both Arkansas and Tennessee, jeopardizing the safety of his passenger and himself, every occupant of the 29 vehicles he passed on the streets and highways, and the officers in the pursuit. When the shots were finally fired, the threat was continuing and had not abated.

B. The initial stop, chase, and final stop of the Rickard vehicle

West Memphis Police Lieutenant Joseph Forthman stopped a white Honda Accord about midnight July 18, 2004, in the parking lot of a gas station in West Memphis for having a headlight out. Rickard was the driver of the car, and Allen was his front seat passenger. Pet. App. 3. As he approached the car, Forthman noticed a broken indentation in the windshield about the size of a human head or a basketball. Forthman Dep. at 27:2-6 (J.A. 134). Allen, the passenger, volunteered that the damage to the windshield resulted from the car hitting a curb. *Id.* at 27:8-16 (J.A. 134). Forthman noticed glass chips and dust still on the dashboard. *Id.* at 27:6-7 (J.A. 134). Forthman questioned Rickard for a few moments, asking for his identification, where he had come from and where he was going, and whether he had any beer to drink that night, seeing a case of beer in the car's back floorboard. *Id.* at 27:18-24, 28:1-9, 31:15-19 (J.A. 134-35, 138). Rickard claimed that the pair had come from their hotel, but could not give the name or location of the hotel. Video of Unit 279 (Forthman) at 11:09-15. He further claimed they were going to purchase a light to fix their inoperable headlight. *Id.* When Rickard was going through his wallet, Forthman noticed that Rickard appeared to repeatedly skip over an identification card and that his hands were shaking. *Id.* at 27:20-24, 28:1-9 (J.A. 134-35). Forthman then asked Rickard to get out of the car. *Id.* at 29:13-14 (J.A. 136).

Rickard did not exit the car or respond. Forthman again ordered Rickard to get out of the car and Rickard disobeyed the officer's command. Video of Unit 279 (Forthman) at 11:09:18. Rickard instead drove off, fleeing the traffic stop. Forthman ran to his police cruiser and began to purse the Honda. He radioed that he was in pursuit and gave a description of the vehicle and his location. Video[2] of Unit 279 (Forthman) at 11:09:21.

Several more West Memphis officers joined in the Rickard pursuit: Vance Plumhoff, Jimmy Evans, Lance Ellis, Troy[3] Galtelli, and Bryan Gardner. Plumhoff soon became the lead police vehicle in the pursuit. "Dash-cams" in three of the six police vehicles recorded all or parts of the chase and subsequent activity. Pet. App. 3

Rickard entered I-40[4] heading east to Memphis. He crossed over the I-40 DeSoto bridge from Arkansas

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[2] The Videos were requested by this Court and provided to the Court by the district court.

[3] He is incorrectly named "Tony" in various documents and pleadings in the case.

[4] I-40 is a busy interstate highway that runs from Barstow, California to Wilmington North Carolina, for over 2,400 miles. The stretch in West Memphis, Arkansas where I-40 (east and west) and I-55 (north and south) travel together for a little over two miles for many years has long been the second busiest route for tractor trailer traffic in the United States. Noel E. Oman, *Agency touts I-40-to-I-55 link: Delta Regional Authority is adding its resources to project*, Ark. Dem.-Gaz. July 5, 2006, § Ark. at 1 (Internet version at 9).

into downtown Memphis, Tennessee. During the chase, Plumhoff stated on the police radio that "he just tried to ram me." Forthman said on his radio, recorded on the video, that "he is trying to ram another car," followed by "[w]e do [now] have aggravated assault charges on him." Pet. App. 3-4 (bracketed material added); Video of Unit 279 (Forthman) at 11:11:36-37. (J.A. 176-77, 228, 234).

In deposition and affidavit testimony, the officers described what appeared to them to be Rickard attempting to veer or ram his car into Plumhoff's and Evans's police cars, which they reported over their radio during the pursuit. (J.A. 176-77, 228, 234); Pet. App. 4; Video of Unit 279 (Forthman) at 11:11:36.

While on I-40, Rickard dangerously weaved and passed approximately 29 civilian motorists, some of whom were forced to the side of the interstate due to Rickard's dangerous high-speed driving. Video of Unit 279 (Forthman) at 11:09:22-11:14:17. With officers still in pursuit, Rickard abruptly veered off I-40 into downtown Memphis at the Danny Thomas Boulevard Exit. *Id.* at 11:13:22. As he exited, Rickard pulled directly in front of and cut off a truck pulling a trailer; the driver of that vehicle had to brake quickly in order to avoid hitting Rickard. *Id.* The vehicles proceeded onto Alabama Avenue briefly before Rickard turned right onto Danny Thomas Boulevard. *Id.* at 11:13:33. At that point, Officer Evans is heard on the radio asking whether to terminate the pursuit. Evans asked: "terminate the pursuit?" Vance Plumhoff responded: "negative. See if you can get in front of

him." *Id.* at 11:13:51 (J.A. 339). As Rickard approached Jackson Avenue, he made a sharp right turn onto Jackson and was hit by a pursuing police vehicle.[5] Aff. of Evans, ¶ 14 (J.A. 227-29); Video of Unit 279 (Forthman) at 11:14:11. That caused Rickard's vehicle to spin around in a parking lot at the intersection of Danny Thomas and Jackson. Video of Unit 279 (Forthman) at 11:14:15; *Estate of Allen*, 509 Fed. Appx. at 390.

The three dash-cam videos provide a complete view of all that follows. Rickard collided head-on with Plumhoff's cruiser and this is captured precisely on Video of Unit 286 (Galtelli) at 12:17:44; (J.A. 182). Plumhoff thought his car was disabled based on the impact and force of the collision. Plumhoff Depo. at 66:7-9; 76:16-23 (J.A. 182, 185-86).[6]

After Plumhoff's collision with Rickard's vehicle, Rickard was not stopped and he continued to refuse to submit to the officers' commands and show of authority as the six West Memphis officers attempted to arrest him. (J.A. 182-83, 197-98). They formed a semicircle around his vehicle and attempted to use

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[5] It was not a PIT maneuver. "PIT" stands for "precision intervention technique" and is a technique where officers make contact with the back of a vehicle they are pursuing in a manner that makes the suspect's vehicle spin to a stop. *Scott v. Harris*. 550 U.S. 372, 375 (2007).

[6] Plumhoff was apparently driving the police car seen on dash-cam video as immediately dropping out of the second pursuit and pulling over on Jackson Avenue.

the building in the parking lot to prevent him from fleeing. Video from Unit 279 (Forthman) at 11:14:21. Evans and Plumhoff got out of their vehicles and came at Rickard on foot. Evans tried to get into the vehicle in order to stop the driver by beating on the passenger-side window and windshield with the butt of his firearm. Aff. of Evans, ¶ 16 (J.A. 229). Rickard struck Evans's right hand with some part of the Honda while Evans was attempting to gain entry into the car. (J.A. 229, 234) Evans testified via affidavit that he feared for his safety due to Rickard's actions. (J.A. 230).

Other officers, including Lance Ellis, were on foot in close proximity to the Honda. Video of Unit 279 (Forthman) at 11:14:21-29. Rickard accelerated and spun his tires as he rammed Gardner's occupied police cruiser. Rickard was trying to escape by pushing the police cruiser out of his way. Aff. of Gardner ¶¶ 18-20 (J.A. 223); Plumhoff Depo. 127:21-128:1 (J.A. 197); Video of Unit 279 (Forthman) at 11:14:20-24; Video of Unit 286 (Galtelli) at 12:17:42-46. Gardner was still briefly in his car and then exiting his car during the time Rickard was ramming it. Video of Unit 279 (Forthman) at 11:14:20-24. Immediately after the Honda began ramming Gardner's patrol unit, Plumhoff fired three rounds at the driver through the windshield from the right front fender of the Honda. Video of Unit 279 (Forthman) at 11:14:22-24; Video of Unit 286 (Galtelli) at 12:17:43-46; Plumhoff Depo. at 67:6-19 (J.A. 183). Video of Unit 286 (Galtelli) at 12:17:47; Video of Unit 279

(Forthman) at 11:14:22-34; Plumhoff Depo. at 127:21-128:1 (J.A. 197); Aff. of Gardner ¶ 18 (J.A. 223).

At the time Plumhoff fired, Rickard could have easily run Plumhoff, Gardner, or Evans over with the Honda given their proximity to it while on foot. Video of Unit 279 (Forthman) at 11:14:21-24. Plumhoff testified he used deadly force at that time because he feared he would be seriously injured or killed given Rickard's use of the car as a weapon. (J.A. 183).

After Plumhoff shot, Rickard reversed his car, making a U-turn in the parking lot and escaped onto Jackson Avenue. Aff. of Gardner ¶ 21 (J.A. 223); Video of Unit 286 (Galtelli) at 12:17:47. As Rickard reversed onto Jackson Avenue, Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid Rickard hitting him. Video of Unit 279 (Forthman) at 11:14:25-29; Video of Unit 286 (Galtelli) at 12:17:47-51; Video of Unit 284 (Ellis) at 12:17:08-10; Aff. of Ellis ¶15 (J.A. 211); Forthman Depo. at 152:5-20 (J.A. 165-66). Ellis testified via affidavit that he feared serious physical injury at that time. (J.A. 211). Gardner then fired ten shots at the driver. Galtelli also fired two shots at Rickard. Video of Unit 279 (Forthman) at 11:14:31-32; Video of Unit 284 (Ellis) at 12:17:11; Video of Unit 286 (Galtelli) at 12:17:52; Forthman Depo, at 131:11-24, 153:17-154:5 (J.A. 160, 167). Both Gardner and Galtelli provided affidavit testimony that Rickard posed a risk to their safety, the safety of their fellow officers, and the safety of the general public. (J.A. 217, 223-24). Three of Petitioners never used deadly force: Officers

Forthman, Evans, and Ellis. Video of Unit 279 (Forthman), 11:14:22-11:14:32.

Rickard finally lost control of his car and crashed into a low retaining wall and then went briefly airborne into a building at the corner of Jackson Avenue and Manassas Street. Right before crashing, however, Rickard pulled in front of an oncoming vehicle on Jackson Avenue. Video of Unit 279 (Forthman) at 11:14:48. Tragically, both Rickard and Allen died. Pet. App. 6 (quoting *Estate of Allen v. City of West Memphis*, 2011 WL 197426, *3 (W.D. Tenn. Jan. 20, 2011)).

C. Proceedings in the District Court

Plaintiff-respondent, the Estate of Donald Rickard, filed a state court civil suit in Shelby County, Tennessee, against Petitioners, the Mayor and Chief of Police of the City of West Memphis, Arkansas, and the City itself, alleging violations of Rickard's rights under, *inter alia*, the Fourth and Fourteenth Amendments to the United States Constitution. Additionally, the Respondents asserted violations of the Arkansas and Tennessee Constitutions, various state torts, and asserted various state statutory causes of action.[7] The Petitioners removed the Shelby County state case to the U.S. District Court for the Western District of

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[7] Only the issues arising under the Fourth Amendment to the United States Constitution, by and through 42 U.S.C. § 1983, are before this Court.

Tennessee. *Estate of Rickard v. City of West Memphis*, 05-2585 (W.D. Tenn. 2005)

The case was consolidated with *Estate of Allen* in the district court and that portion of the case (passenger case) remains pending in the Western District of Tennessee. Following discovery, the Petitioners moved for summary judgment and asserted qualified immunity. The district court granted summary judgment to Petitioners on the claims made by the Passenger's Estate, but denied Petitioners summary judgment and qualified immunity to as to the claims made by the Rickard Estate under the Fourth Amendment. The Petitioners took an interlocutory appeal to the Sixth Circuit of the denial of qualified immunity regarding the Respondent's Fourth Amendment claim.

D. Appeal to the U.S. Court of Appeals for the Sixth Circuit

The Sixth Circuit affirmed the denial of summary judgment based on qualified immunity. The court of appeals reasoned that, at the time of the shooting in this case, Rickard was "essentially stopped" and surrounded by police and police cars. While the court of appeals noted Rickard was still making "some effort" to elude capture (Pet. App. 9), the court found that it could conclude as a matter of law that Rickard's conduct was sufficient to justify a reasonable officer using deadly force to end the pursuit.

Notably, the court of appeals found that, from its view of the videos, it could not determine the degree of danger to the officers. Consequently, the court of appeals affirmed the denial of qualified immunity, citing *Scott v. Harris*, and concluding *Scott* was factually distinguishable. 509 Fed. Appx. at 391. While the court of appeals suggested that factual disputes existed, it failed to say what they were and, most importantly, whether they were material, i.e., outcome determinative, of the question of immunity. Rather, it appears that the circuit court characterized Rickard as essentially stopped, distinguished cases where the fleeing motorist was not stopped, and based its decision on that distinction. Furthermore, the Sixth Circuit never addressed the second prong of *Saucier v. Katz*, 533 U.S. 194 (2001), which it was required to do, i.e., whether the Petitioners violated clearly established law as of July 2004.[8]

Petitioners sought certiorari from this Court, which was granted November 15, 2013.

SUMMARY OF THE ARGUMENT

The court of appeals improperly applied the law of qualified immunity in a number of ways: it either

[8] *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("if the plaintiff has satisfied [the] first step, the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct.").

merged the two prong test into one or simply failed to address the "clearly established" prong of a qualified immunity analysis. The circuit court also applied rules that were not defined at a sufficient level of specificity to put Petitioners on notice that their conduct was unconstitutional and applied case law that was decided after Petitioners' encounter with Rickard. Moreover, the court of appeal's holding was in direct contradiction of its own precedent prior to July 2004 on qualified immunity and use of deadly force.

When the qualified immunity test is properly applied to the undisputed facts in this case, it is clear Petitioners are entitled to reversal and qualified immunity from this suit.

Furthermore, based on the videos and the undisputed material facts, Petitioners' actions were objectively reasonable, and, therefore, did not violate the Fourth Amendment. It was objectively reasonable for Petitioners to conclude that Rickard was a danger to himself, his passenger, the Petitioners, and to the public in general based on the undisputed facts in this case.

Finally, as a matter of public policy, we must not encourage individuals to flee from the police by telling officers they simply cannot engage in high-speed pursuits. This is true whether the initiating event is a felony or a misdemeanor. Moreover, we should not encourage individuals to drive dangerously and threaten officers and the public at large with

their vehicles. The only recourse some officers have in some situations: shooting to disable the threat.

It is tragic that Rickard and his passenger died because of an encounter that started out as a traffic stop for a burned out headlight. Regardless, Rickard's reckless felony flight and aggravated assault on police officers transformed the nature of the encounter and ultimately led to his own death and the death of his passenger. When Petitioners shot Rickard, they were shooting a felon who remained a threat to the officers and the public at large. This Court should afford qualified immunity to the Petitioners.

ARGUMENT

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982)). Courts have discretion which of the two prongs to analyze first. *al-Kidd*, 131 S. Ct. at 2080; *Pearson*, 555 U.S. at 236-38. As shown below, Petitioners are entitled to qualified immunity because Rickard cannot satisfy either prong. Because the Sixth Circuit's errors with respect to the second, "clearly established law," prong

are so manifest, we begin there and then turn to the first prong.

The matter was heard by the district court on the Petitioners' motion for summary judgment. While the Sixth Circuit found a question remained for the jury, that question was really an issue of law for the Court to decide. This is evident from the court of appeals' failure to note any disputed material facts in its opinion. This Court has already found that "objective reasonableness" under the Fourth Amendment based on a set of historical facts is a question of law. *Scott*, 550 U.S. at 382 & n.8 (2007).

I. Petitioners are entitled to qualified immunity because the law at the time of their conduct did not clearly establish that they violated the Fourth Amendment.

In this case, it was not clear to "every reasonable official" that Petitioners conduct violated the Fourth Amendment. The constitutional issue underlying the Petitioners' use of force was not "beyond debate" as of July 2004. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). If it is at least arguable, for qualified immunity purposes, that the officers' actions were within the law, then the officers are entitled to qualified immunity. *Id.*, 132 S. Ct. at 2096.

Qualified immunity serves important policy purposes: First, "'[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments,'" and protects "'all but the

plainly incompetent or those who knowingly violate the law.'" *Stanton v. Sims*, 134 S. Ct. 3, 4 (2013) (per curiam) (quoting *al-Kidd* at 131 S. Ct. at 2085) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Secondly, it enables courts to avoid deciding constitutional questions unnecessarily – if a right was not clearly established, a court need not determine whether the officers' actions were objectively reasonable. *Reichle*, 132 S. Ct. at 2093; *Pearson*, 555 U.S. at 236-38. In every Fourth Amendment case, qualified immunity offers additional protection beyond the constitutional objective reasonableness analysis.

The Sixth Circuit either improperly conflated the two distinct questions[9] under the *Saucier* qualified immunity analysis or simply failed to answer both of those questions as it was required by precedent to do. *Pearson*, 555 U.S. at 232 ("if the plaintiff has satisfied [the] first step, the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct."). The result is the same: the Sixth Circuit never discussed whether the use of force by Petitioners violated clearly established law at the time the force was employed in July of 2004.

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[9] *al-Kidd*, 131 S. Ct. at 2084 ("The general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.").

The very nature of the "clearly established" inquiry requires courts to consider only that law that was known or could be known to the officers at the time of their conduct. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

"To be clearly established, a right must be sufficiently clear 'that every reasonable official would [have understood] that what he is doing violates that right.'" *Reichle*, 132 S. Ct. at 2093. Existing precedent must have made the question presented so clear that it was "beyond debate" at the time the officials acted. *Id.* "Clearly established" means a reasonable officer understands whether their actions violate a suspect's rights because the contours of the right are clearly defined. *al-Kidd*, 131 S. Ct. at 2083. And, this Court has often admonished lower courts "not to define clearly established law at a high level of generality." *Id.* at 2084 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987)).

This Term, the Court held in *Stanton v. Sims*, that an officer [Stanton] who entered the plaintiff's yard in pursuit of another person had qualified immunity because the officer "was not 'plainly incompetent'" based on the state of the law *at the time* he entered Sims' yard. 134 S. Ct. at 7. In *Stanton*, the Court reviewed its own cases, district and circuit court cases from the district where the action occurred as well as state decisions and concluded the constitutional question was not "beyond debate" *at the time* Stanton entered Sims' yard. *Id.* Consequently,

the Court reversed and granted the officer qualified immunity. *Id.*

Here, the Sixth Circuit misapplied the qualified immunity doctrine in multiple ways. When the doctrine is properly applied, the result is plain: Petitioners are entitled to qualified immunity, for the law in July 2004 supported their actions; further, it assuredly did not clearly establish that their actions were unconstitutional.

A. The court of appeals improperly applied the qualified immunity doctrine.

1. The court of appeals either failed to apply the "clearly established" prong of the doctrine or conflated the two prongs.

The Sixth Circuit affirmed the denial of qualified immunity because it could not conclude "that the officers' conduct was reasonable as a matter of law." Pet. App. 10. That resolved (incorrectly, we submit) only the first prong of the qualified immunity analysis. At that point, one would have expected the court to turn to the second prong: Whether the unlawfulness of Petitioners' actions was clearly established at the time they engaged in it. But the court did no such thing. That is manifest error. As explained above, an officer is entitled to qualified immunity unless his conduct, at the time he engaged in it, was clearly unlawful.

To the extent the Sixth Circuit concluded that the qualified immunity doctrine seeks to distinguish between officers who acted reasonably from those who acted unreasonably – and by finding that it could not conclude Petitioners' conduct was reasonable as a matter of law, it resolved both prongs of the doctrine at once, it committed reversible error. In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court expressly rejected that approach. That case, like this one, involved a claim of excessive force in violation of the Fourth Amendment. And, claims of excessive force are analyzed under the Fourth Amendment's objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

In *Saucier*, the "Court of Appeals concluded that qualified immunity is merely duplicative in an excessive force case, eliminating the need for the second step where a constitutional violation could be found based on the allegations." 533 U.S. at 203. That is because, the court thought, both steps "concern the objective reasonableness of the officer's conduct in light of the circumstances the officer faced on the scene." *Id.* at 200. But just as the Court rejected that reasoning in Fourth Amendment search cases in *Anderson v. Creighton*, 483 U.S. 635 (1987), it rejected it in excessive force cases in *Saucier*.

The reasoning of the Ninth Circuit in *Saucier* – and the Sixth Circuit here – misperceived the nature of the qualified immunity inquiry, which "has a further dimension than the excessive-force reasonableness inquiry established in *Graham*." *Saucier*, 523 U.S. at 205.

> The concern of the qualified immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal restraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. . . . If the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense.

Put another way, "*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts." *Id.* The qualified immunity doctrine therefore "protect[s] officers from the sometimes hazy border between excessive and acceptable force, and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Id.* at 206 (citations and quotation marks omitted).

The Sixth Circuit wrongly denied Petitioners that protection. It should have, but did not, look at its precedents (and those of the Eighth Circuit) in similar cases to determine whether they clearly established the unlawfulness of Petitioners' conduct.

Petitioners also submit the court of appeals improperly applied the law of qualified immunity as it pertains to claims of excessive force in direct contradiction of this Court's precedent. It was not sufficiently clear, so as to place the constitutional question "beyond debate" in July 2004, whether it was objectively reasonable to shoot a dangerous suspect to end

the threat he posed with a vehicle in a high-speed chase. Moreover, to the extent that it *was* clear, case law strongly suggested that Petitioners' actions did not violate Rickard's constitutional rights. The court of appeals also improperly denied qualified immunity by relying on cases decided *after* the encounter between Petitioners and Rickard, rather than cases before and up to the time that the events in this case occurred in 2004.

2. The court of appeals improperly assessed Petitioners' 2004 conduct by comparing it to the facts of a 2007 case.

The court of appeals was obligated to consider only law that was available to the officers *at the time of the incident*, not later, in answering the second prong of the qualified immunity analysis. *See Brosseau*, 543 U.S. at 198 & 200 n.4 ("These [post-conduct] decisions, of course, could not have given fair notice to Brosseau and are of no use in the clearly established inquiry.") It could not seriously be suggested that, by reference to subsequent case law, Petitioners had fair notice of what was and was not prohibited by our Constitution.

The court of appeals relied on this Court's 2007 decision of *Scott v. Harris* to decide the immunity

question posed in Petitioners' appeal.[10] This is unfair to Petitioners, indeed, any public servant, requiring them to look into the future to determine whether their actions are potentially unreasonable. The only qualified immunity cases cited by the court of appeals that were decided before the incident in question were from the Eleventh Circuit. But, Petitioners live and work in the Eighth Circuit, and the incident occurred in the Sixth Circuit.[11] Petitioners could not have known that their actions would be held to violate the law in either the Sixth or the Eighth Circuit based on Eleventh Circuit precedent.

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[10] As discussed below, the court of appeals was also incorrect in distinguishing the facts of *Scott* from the facts of this case. Indeed, the decision in *Scott* applies to this case and is controlling, and it was reasonable as a matter of law for Petitioners to use deadly force given the dangers posed by Rickard. Rickard's unrestrained flight that endangered the officers and the public, and his manner of driving depicted in the three dash-cam videos was, without doubt, the commission of dangerous and ongoing felonies. Ark. Code Ann. § 5-54-125(d)(2) (fleeing in a vehicle if operated in a manner that creates a substantial danger of death or serious physical injury to others is a felony); Tenn. Code Ann. §§ 39-13-103(b)(2) (reckless endangerment with a deadly weapon is a felony) and 39-16-603 (evading arrest that endangers others is a felony); Ark. Code Ann. § 5-13-204(a)(1) (aggravated assault). Indeed, anyone who reviews the video evidence in this case can see the dangers posed by Rickard during the pursuit and until it finally ended after officers used deadly force.

[11] The Sixth and Eighth Circuit law is in accord on the substantive questions posed in this case.

B. The law in July 2004 did not clearly establish that Petitioners' use of deadly force was objectively unreasonable in violation of the Fourth Amendment.

No one disputes that the general "objective reasonableness" standard of *Graham* was clearly established in July 2004. To the extent the court of appeals concluded that Petitioners violated *that* clearly established law, it made the identical mistake the courts of appeals made in *Saucier* and *Brosseau*: the *Graham* standard is "cast at a high level of generality" and therefore does not answer whether the law was "'clearly established' in a more particularized sense, and hence more relevant sense[:], . . . [W]hether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau*, 543 U.S. at 199; *Saucier*, 533 U.S. at 202. In making that particularized assessment, courts must recognize that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. There is no "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott v. Harris*, 550 U.S. 372, 382 (2007).

A proper qualified immunity inquiry shows that Petitioners did not violate clearly established law when they used deadly force to end the threats posed

by a dangerous high-speed chase where the suspect refused all efforts to stop. The law did not put reasonable officers on notice that the specific undisputed conduct in this case could violate a suspect's constitutional rights.

1. *Brosseau v. Haugen* shows the law was not clearly established at the time of the events in this case.

Under *Brosseau* and *Saucier*, then, the appropriate issue here is whether it was clearly established in July 2004 that the use of deadly force to end the threats posed by Rickard in a high-speed chase violated the Fourth Amendment. Here, Rickard took Petitioners on a dangerous, fast-paced chase for miles on city streets and interstate highways. He sped and weaved in and out of traffic, cut off vehicles in flight, collided with police vehicles, nearly backed over an officer, and continued to pose a threat of serious physical injury or death to officers, the public, himself, and his passenger. Only then did three of the Petitioners utilize deadly force to try and end the threats posed by Rickard.

In December 2004, just five months after the events in this case, this Court held in *Brosseau* that there was no clear answer to the question whether it is acceptable "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." 543 U.S. at 200. *Brosseau* involved a police officer who

shot a dangerous fleeing suspect in the back. This Court did not rule on the first prong of *Saucier*, but rather reviewed only the "clearly established" issue of the second prong of the qualified immunity analysis. *Id.* at 198. The Court recognized that as of February 21, 1999 (the date of the shooting in *Brosseau*) no other court had found a Fourth Amendment violation when a police officer "shot a fleeing suspect who presented a risk to others."[12] *Id.* at 200

Comparing the facts in *Brosseau* and those in this case, it is clear the Officers did not violate any clearly established constitutional right. In that case, an officer responded to a report of a fight at a residence. *Id.* at 195. Upon arrival, the officer searched for the suspect until the officer saw the suspect running in a neighbor's driveway. *Id.* at 195-96. The officer chased the suspect, who was able to enter a Jeep. *Id.* The officer with her gun drawn ordered the suspect to exit the vehicle. *Id.* The officer attempted to prevent the suspect from starting the Jeep, but she was unsuccessful. *Id.* When the suspect started the Jeep, it caused the officer to step back. *Id.* As the vehicle began to move, the officer "fired one shot through the rear driver's side window at a forward angle, hitting Haugen [the suspect] in the back." *Id.* at 196-97. The officer explained that she fired her weapon because she feared for the safety of other

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[12] The Supreme Court only reviewed cases issued before February 21, 1999. *Brosseau*, 543 U.S. at 200 n.4.

officers in the area, as well as the safety of citizens in the area. *Id.* at 197.

The Court analyzed cases from the Sixth and Eighth Circuits, in which the courts of appeals "found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others." *Id.* at 200-01 (discussing *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993)). The Court also considered a case from the Seventh Circuit in which that court reached the opposite conclusion. *Brosseau*, 543 U.S. at 201. After observing that "this area is one in which the result depends very much on the facts of each case," the Court concluded that the "cases by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment." *Id.*

Because the threat to the officers and the public posed by Rickard was even greater than the threat posed by the fleeing felon in *Brosseau*, its holding controls here: the law was not clearly established on July 18, 2004 that Petitioners violated Rickard's constitutional rights.

Rickard dangerously passed 29 vehicles, crossed state lines, rammed his car into two separate police cars prior to Petitioners' first use of deadly force, and then nearly backed over Officer Ellis. Rickard posed a threat of serious bodily harm or death to himself, his passenger, the public and the Petitioners before, during, and after the use of deadly force in this case. Unlike the perhaps speculative risk posed by Haugen

in *Brosseau* to officers and the public, Rickard was a demonstrable threat and continued to be such a threat even after deadly force was employed.

Furthermore, it was not clearly established in July of 2004 (and it is still not clearly established) that, where deadly force is authorized, officers may not continue to use such force until a threat is eliminated. Rather, the circuit courts have held that where deadly force is constitutionally permissible, it remains permissible until the threat is eliminated; that is, officers can continue using such force during the pendency of a threat.[13] The number of shots fired by

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[13] *See, e.g., Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996), concurring opinion on denial of rehearing, 105 F.3d 174 (4th Cir. 1997) ("The number of bullets fired is likewise irrelevant; if it was objectively reasonable for the officers to use deadly force, it was also objectively reasonable for the officers to continue firing until they were sure the threat to their lives had ceased."); *Estate of Rogers v. Smith*, 188 Fed. Appx. 175, 182-83 (4th Cir. 2006) (repeatedly shooting suspect who pulled gun after a traffic chase ended); *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007) ("It may well be true that Conley continued to fire as Berube fell to or lay on the ground. But it is clear from the very brief time that elapsed that she made a split-second judgment in responding to an imminent threat and fired a fusillade in an emergency situation. Conley's actions cannot be found unreasonable because she may have failed to perfectly calibrate the amount of force required to protect herself."); *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010) (not unreasonable to shoot the driver of a minivan sliding around in wet grass and mud who's driving created a serious risk of danger to an officer in the way); *Jean-Baptist v. Gutierrez*, 627 F.3d 816 (11th Cir. 2010) (first high-speed chase then chase on foot, and officer

(Continued on following page)

three of six Petitioners is constitutionally irrelevant because Rickard indisputably remained a threat even after deadly force was employed in this case. In the very least, the firing of fifteen shots at a motorist, over a matter of approximately ten seconds, to end the threat posed by the motorist did not violate any clearly established law under the Fourth Amendment in July of 2004. Therefore, Petitioners are entitled to qualified immunity.

2. Sixth Circuit case law did not clearly establish that the Petitioners' actions were unconstitutional in July 2004.

Case law arising from the place of the shooting (the Sixth Circuit) and where the officers worked (the Eighth Circuit) demonstrates that Petitioners' conduct did not violate clearly established law. Starting with the Sixth Circuit: In April 2004, three months before Petitioners' encounter with Rickard, the Sixth Circuit held that officers were reasonable in firing on a suspect who was actively using his vehicle as a weapon against police and dangerously attempting to escape and evade apprehension. *VanVorous v. Burmeister*, 96 Fed. Appx. 312, 314 (6th Cir. 2004). Officers received a call that someone, later identified as John VanVorous, was vandalizing a local gas station. *Id.* at 313. Officers eventually located

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confronted armed robbery suspect; 14 shots were not unreasonable).

VanVorous in a red GMC Jimmy. *Id.* The vehicle sped away, and the officers gave chase. *Id.* Other officers joined the chase, and the chase continued beyond city limits. The Sixth Circuit described the reckless and dangerous driving that led to the officers shooting VanVorous, which was very similar to the circumstances Petitioners faced in this case:

> . . . VanVorous drove onto a grassy patch of land, fishtailed, and headed back the way he had just traveled. The state troopers followed the Jimmy onto the grass, and the next two police cars in pursuit attempted to box VanVorous in as he drove back toward them. VanVorous, however, was able to maneuver between the two vehicles and continue on his way, just as Burmeister was arriving in the area. Rather than trying to evade the last police car, VanVorous drove eastward in the westbound lane and crashed into Burmeister's vehicle at a speed estimated to have been approximately 14 miles per hour. After the collision, VanVorous continued to rev his engine and began pushing the police cruiser backward. While VanVorous continued to force the cruiser backward toward a ditch, Burmeister jumped from the vehicle and fired his weapon at the Jimmy numerous times. The two state troopers rushed to the scene, broke the windows on the Jimmy with their flashlights or night sticks, and when that action failed to stop VanVorous, they opened fire on him.

Id. at 313-14.

The district court ruled that the officers' efforts were reasonable, because they were attempting to prevent the escape of a suspect they reasonably believed posed a danger. *Id.* (quoting *Garner*, 471 U.S. at 3). In the alternative, the district court held that even if the officers' actions were unreasonable, there was no clearly established law to put the officers on notice that shooting a suspect in those circumstances was unlawful. *Id.* The Sixth Circuit affirmed application of qualified immunity.

In *VanVorous*, the Sixth Circuit took note of the district court's emphasis on "the uncontroverted evidence that [the suspect] continued to rev his engine while pushing the police car toward a ditch, squealing his tires, creating an enveloping cloud of smoke, and threatening to disengage his vehicle from the cruiser at any moment." *Id.* at 314. The Sixth Circuit wrote, "In short, in concluding that the defendants' responses were objectively reasonable, the district judge accurately described the inherent danger of the situation facing the city and state police." *Id.*; *see also Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992); *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000).

That case is discussed in detail because it is so closely on point with this case. In both cases, the suspect presented a significant danger to the officers and the public at large. Also, in both cases the suspect used his vehicle as a deadly weapon. Thus, because the threat remained, and because the cases discussing this issue permit officers to utilize deadly force to

stop such a threat, Petitioners did not violate clearly established law as of July 2004.

The foundation of the court of appeals' opinion in this case is its finding that Rickard was "essentially stopped" at the time force was used. However, that characterization of the events in this case is, we respectfully submit, blatantly contradicted by the undisputed video evidence. The video recordings show Rickard was never actually stopped in any sense until he crashed down the road from where the shooting took place. This is the same error committed by the Eleventh Circuit in *Scott v. Harris*, prior to this Court's reversal. 550 U.S. at 378-79. While at the time of the first three shots in this case, Rickard was not covering much ground in the Honda, he was using it to ram Officer Gardner's car.

Based on *VanVorous* alone, and given the undisputed facts as shown by the dash-cam videos and the testimony of the Petitioners, the holding of the court of appeals was incorrect because the clearly established law in the Sixth Circuit *did*, in fact, permit officers to use deadly force in a situation very similar to the one Petitioners faced. Consequently, the Sixth Circuit committed error in failing to grant the officers qualified immunity in this case because its own precedent established Petitioners did not violate clearly established law.

3. Eighth Circuit law also did not clearly establish that the Petitioners' actions were unreasonable at the time.

Petitioners were certified law enforcement officers in the Eighth Circuit, and they were informed by their own Circuit's decisions in ascertaining the clearly established law as of the date of the incident in this case. Those decisions did not clearly establish that Petitioners acted unconstitutionally; if anything, they support the lawfulness of their conduct.

In *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), the Eighth Circuit found the decision by a police officer to shoot a suspect upon probable cause that the vehicle driven by the suspect posed an imminent threat of serious physical harm was not objectively unreasonable. Like the case here, the Court noted the reasonableness of the officer's conduct because "Rice had seen the truck force several motorists off the road and threaten the safety of many others." *Id.* Additionally, the court also found that the officers who did not "seize" the suspect and were not sued as supervisors were summarily entitled to summary judgment, *id.*, which is the case here as it pertains to Petitioners Forthman, Ellis, and Evans.

Similarly, in *Hernandez v. Jarman*, 340 F.3d 617, 623 (8th Cir. 2003), decided 11 months before this incident, the Eighth Circuit held the use of deadly force permissible if an officer has probable cause to believe that a suspect posed serious physical injury or

a threat of death to the officer or others. *Id.* at 623. The court summarized the events as follows:

> The undisputed facts in this case demonstrate that Six Feathers [the suspect] continually eluded the officers and took them on a lengthy and highly dangerous chase. Near the end of the pursuit, Six Feathers intentionally drove his car directly into Tarrell's [a sheriff deputy] vehicle. Jarman [a sheriff deputy] testified that it was his belief that Six Feathers was an "immediate threat." Jarman further testified that, after the collision, he believed Six Feathers, as he was backing up and turning his car in Jarman's direction, intended to run him over.

Id. (bracketed material added). "[W]e hold that Jarman's use of deadly force was objectively reasonable under the circumstances as Jarman knew them to be at that time." *Id.* Indeed, in this case, there are multiple instances of such conduct against the officers and each officer has testified to the threat of serious harm they perceived. Ignoring such testimony would impermissibly be engaging in 20/20 hindsight. Most importantly, *Hernandez* demonstrates that Petitioners' conduct did not violate clearly established law in July of 2004.

* * *

No matter which source the Court looks to, Petitioners are entitled to qualified immunity because they had every reason to believe their conduct was objectively reasonable.

> But whether or not the constitutional rule applied by the court below was correct, it was not "beyond debate." *al-Kidd*, *supra*, at ___, 131 S.Ct. 2074, 2083 (slip op., at 9). [Petitioners] may have been mistaken in believing [their] actions were justified, but [t]he[y were] not "plainly incompetent." *Malley*, 475 U.S., at 341.

Stanton, 134 S. Ct. at 7 (bracketed material added). Because the Petitioners' conduct was not, as established by clear prior case law, unconstitutional "beyond debate," they did not violate clearly established law and are entitled to qualified immunity. The court of appeals thus incorrectly denied qualified immunity, and the judgment should be reversed.

II. Petitioners are entitled to qualified immunity because their use of deadly force was an objectively reasonable response to Rickard's felony fleeing in a high-speed chase across state lines under *Scott v. Harris*, *Tennessee v. Garner*, and *Graham v. Connor*.

It is settled that excessive force claims must be analyzed pursuant to the Fourth Amendment objective reasonableness standard. *Graham*, 490 U.S. at 395. Determining the objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing

governmental interests at stake." *Id.* at 396 (internal quotation marks and citation omitted).

When analyzing officers' actions under the Fourth Amendment, the proper question is whether the officers' actions were objectively reasonable in light of the totality of the circumstances they faced. *Id.* at 396-97. The inquiry is necessarily fact-specific, "requir[ing] careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* *See also*, *Brousseau*, 543 U.S. at 198-99.

The proper perspective to consider is that "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" to "allow for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham* at 396-97. Given the danger Rickard posed to Petitioners and the public throughout the incident and up to its very end, Petitioners' actions were objectively reasonable.

A. *Scott v. Harris* is similar enough for Petitioners' use of deadly force to be objectively reasonable

The measures Petitioners took to terminate the dangerous vehicular flight of the decedent were objectively reasonable under the circumstances. The facts here are similar to those in *Scott v. Harris*, 550 U.S. 372 (2007), where this Court held, "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386. In *Scott*, the officer rammed the suspect's vehicle with a police cruiser to stop the suspect's dangerous flight. *Id.* at 375. Here, there was a collision between Rickard and Plumhoff's cars, and Rickard spun out. The officers managed to form a semicircle around Rickard's vehicle with their cars and then approached him on foot. Rickard remained a threat in the Honda as he rammed Officer Gardner's car and nearly ran over Officer Ellis. The Petitioners used the only remaining force available to them: their firearms. *See Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992).

Scott held it is acceptable for an officer to ram a suspect's car, forcing him off the road, to stop the dangerous threat posed by the fleeing felon, even though the officer's conduct "places the fleeing motorist at risk of serious injury or death." It follows, then, that officers could permissibly fire their weapons at a

dangerous fleeing motorist in an effort to stop the threat he poses even though it risks injury or death.

The Court, in conducting the balancing test from *Graham v. Connor*, considered the number of lives at risk and further said: "it was respondent, after all, who intentionally placed himself and the public in danger . . . " by his dangerous flight. *Scott*, 550 U.S. at 384. The Court also recognized that the public was innocent relative to the suspect's culpability. *Id.* Notably, the rule announced by the Court in *Scott* permits officers to terminate a dangerous chase by means that are likely to cause serious physical injury or death. *Id.* at 386. The use of firearms by Petitioners, given the undisputed facts in this case, fits easily within the rule laid out in *Scott*, and no extension of that rule is necessary in this case to conclude Petitioners' conduct was objectively reasonable.

Even if this case presented the occasion to consider a narrow extension of *Scott v. Harris*, that is consistent with the public policy discussed by the Court there: "Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness." *Id.*

B. The force used by Petitioners was objectively reasonable and warranted by 1985's *Tennessee v. Garner*.

The videos demonstrate how dangerous this police chase was, and the Officers provided testimony describing the dangers Rickard posed from their perspectives on the scene of the event. The question remains: Was Rickard's offense sufficiently dangerous to warrant the use of deadly force to stop this high-speed chase as a matter of law?

In *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985), this Court balanced the interests of the individual to live against the public and law enforcement interests in preventing escape of a fleeing felon, there a nonviolent felon. *Id.* at 9-10.

Rickard's dangerous high-speed flight from his traffic stop in West Memphis, Arkansas, weaving in and out of traffic on busy I-40 constituted a dangerous felony in risking the lives of everyone he passed on the road, as well as himself, and the officers pursuing him.[14] He then rammed police cars and nearly backed his car over an officer on foot. Then, undeterred, he continued his dangerous flight. Thus, *Garner* applies, *id.* at 1112:

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[14] "Headlong flight wherever it occurs is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

And *Garner* was decided in 1985, 19 years before this incident.

The use of deadly force in this case was objectively reasonable under *Tennessee v. Garner* and *Graham v. Connor*. Rickard was a fleeing felon, wielding his Honda as a deadly weapon, intent on never being captured. He had employed force against officers, and he posed a continuing threat them and to innocent bystanders. *Garner* at 11-12.

Under the circumstances here, considering the rule in *Garner* from 1985, reinforced by the dicta in *Sykes* from 2011 (discussed below), the use of deadly force to stop Rickard was objectively reasonable.

Furthermore, as stated previously, when police officers are confronted with a threat of deadly force and they fire their weapons, various circuit courts have ruled they can keep firing until the threat is over. *See*, note 13.

Petitioners' actions in using deadly force to stop the threat posed by Rickard were objectively reasonable, and the court of appeals should be reversed.

C. As a matter of public policy, this Court has already held officers do not have to allow a suspect in a dangerous police chase to escape, and that public policy holding in *Scott* should apply here.

In *Scott*, this Court considered an argument that the police should simply allow suspects to escape when the vehicular flight is high-speed and therefore dangerous. 550 U.S. at 385. The Court rejected that argument because there was no guarantee that ceasing pursuit would eliminate the danger. *Id.* First, the officers would have no way to communicate to the driver that they were really giving up the chase. *Id.* Second, the Court was reluctant to lay down a rule requiring officers to allow fleeing felons to get away by driving recklessly – this could encourage suspects to try to get away. *Id.* The Court laid down "a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386.

In *Sykes v. United States*, 131 S. Ct. 2267, 2273-74 (2011) this Court held that felony flight in a vehicle is a "dangerous felony" for a U.S. Sentencing

Guidelines enhancement. The Court elaborated, in language fully applicable to this case:

> Because an accepted way to restrain a driver who poses dangers to others is through seizure, officers pursuing fleeing drivers may deem themselves duty bound to escalate their response to ensure the felon is apprehended. *Scott v. Harris*, 550 U.S. 372, 385 (2007), rejected the possibility that police could eliminate the danger from a vehicle flight by giving up the chase because the perpetrator "might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.

As the Court further acknowledged: "once the pursued vehicle is stopped, it is sometimes necessary for officers to approach with guns drawn to effect arrest. Confrontation with police is the expected result of vehicle flight. It places property and persons at serious risk of injury." *Id.* at 2274. The Court referred to statistics of police reports involving vehicular flight and said: "Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony." *Id.*

Therefore, vehicular flight involves a dangerous felony as a matter of law and " . . . the intervening pursuit creates high risks of crashes." *Id.* In this case, the undisputed facts demonstrate the dangers recognized in *Sykes*. And, had Petitioners simply let the

decedent drive away, how would they have communicated to him that the pursuit had ended other than just slowing down? *See Scott*, 550 U.S. at 385. The decedent may have continued to drive recklessly, endangering more lives, simply because he thought the police were still trying to catch him. *See id.* Even if the Petitioners could have told the decedent that they would no longer chase him, he might not have believed them. *See id.* With so much uncertainty as to whether the pursuit would continue, he "might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow." *Id.* Considering *Sykes*, and the undisputed video evidence in this case demonstrating the dangers associated with high-speed police chases, police cannot permit a suspect to continue to dangerously flee and endanger the officers and the public.

Additionally, a holding that requires officers to allow a suspect to escape after he threatens them with his vehicle is sure to create perverse incentives. The Court's recognition in *Sykes* demonstrates officers are already facing dangerous conditions, so we should not encourage any additional dangers. Therefore, the Court should rule that, based on the undisputed facts, the Petitioners are entitled to immunity as a matter of law.

CONCLUSION

The judgment of the court of appeals should be reversed.

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RESPONDENT'S BRIEF

No. 12-1117

FILED
JAN 29 2014
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a Minor Child, Individually and as Surviving Daughter of Donald Rickard, Deceased, by and through her mother Samantha Rickard as Parent and Next Friend,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

(1) Whether the Sixth Circuit properly dismissed the Petitioners' appeal upon a finding that it lacked jurisdiction because of factual disputes.

(2) Whether the Sixth Circuit properly affirmed the district court's denial of qualified immunity to police officers who chased a vehicle containing two unarmed suspects from West Memphis, Arkansas across the Mississippi River bridge into Memphis, Tennessee and then killed both occupants with a total of 15 gunshots fired into the vehicle (1) when there are disputes as to whether aggravated assaults claimed by the officers occurred and they do not show on the video (2) when there are disputes as to whether the officers reasonably perceived threats to themselves or others, and (3) when there are disputes as to whether their actions were ultimately objectively reasonable given that the video evidence demonstrates that the first three shots were fired by an officer from the passenger side of the vehicle, and the remaining 12 gunshots were fired by two other officers as the vehicle was passing and had passed the officers and was continuing to drive away from them down the street with no one in front of the vehicle (all of which is plainly demonstrated on the video).

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STATEMENT OF THE CASE

For the sake of brevity, Ms. Rickard adopts her Statement of the Case previously provided in response to the Petitioners' Petition, but also relies upon the additional facts set forth herein, particularly the testimony of the only two officers who have been deposed in the case thus far, the video evidence, and the summary of the rulings of the district court which were affirmed by the Court of Appeals below.

SUMMARY OF ARGUMENT

The Court of Appeals appropriately dismissed the Petitioners' appeal in this case, which was based upon the Petitioners' disagreement with the district court's reading of factual disputes. Based upon this Court's opinion in *Johnson v. Jones*, 515 U.S. 304 (1995), the Court of Appeals appropriately determined that subject matter jurisdiction was lacking. The factual disputes impact not only the issue of jurisdiction, but also the disposition of this case on a motion for summary judgment.

The courts below appropriately denied qualified immunity to the Petitioners. The district court found genuine issues of material fact based on key disputes: (1) disputes as to whether the claimed aggravated assaults occurred, as they do not show on the video; (2) disputes as to whether the officers reasonably perceived threats to themselves or others; and (3)

disputes as to whether Petitioners' actions ultimately were objectively reasonable.

There are facts which have not been previously developed for this Court which are set forth at length by Ms. Rickard herein to help illustrate the disputes and their significance, principally from the video evidence and the testimony of the officers. They demonstrate that the factual contentions of the Petitioners as to the degree of threat posed by Mr. Rickard do not show on the video, and in fact are undermined in several instances by the video and their own testimony.

The officers' conduct was appropriately found not to have been objectively reasonable in this case, and their efforts to convince this Court otherwise must be viewed in light of at least two fundamental problems. First, they seek to transfer the principles of this Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007), which approved the ramming of a suspect's vehicle to stop a chase, to a shooting situation, which this Court specifically distinguished in *Scott v. Harris*. Second, they argue, in effect, for the adoption of a blanket rule that shooting a suspect who flees in a vehicle is authorized because the suspect has fled in a vehicle.

Moreover, the issue of whether the Fourth Amendment has been violated can be (and in this case is) interrelated with whether there has been a violation of clearly established law. That is because the key disputed issue is the degree of threat Mr. Rickard posed to police. This is dictated by this

Court's opinion in *Tennessee v. Garner*, 471 U.S. 1 (1985), which ties the reasonableness of an officer's use of force to the degree of threat posed by a suspect. Both "prongs" of the qualified immunity analysis (whether there has been a constitutional violation, and whether clearly established law has been violated) can hinge on whose version of the disputed facts are to be believed, because if a plaintiff's version is to be believed, excessive force will have been used in violation of clearly established law; but if the officers' version of events is believed, the officers likely will not have violated clearly established law. In other words, the legal question can be completely dependent upon which view of the facts the jury believes. Cases since *Saucier v. Katz*, 533 U.S. 194 (2001) and *Scott v. Harris* have used such analysis.

In this case, the denial of qualified immunity was appropriate because of disputes about the degree of threat Mr. Rickard posed. However, in the alternative, if this Court deems additional analysis necessary as to the issue of whether clearly established law was violated, the Court can remand this case to the Sixth Circuit for that purpose as the Petitioners' amicus United States suggests, without deciding the issue of Fourth Amendment reasonableness, avoiding unnecessary expenditure of this Court's time and resources.

ARGUMENT

I. THE PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

A. The Court of Appeals appropriately dismissed the appeal initially for lack of jurisdiction over factual disputes as to the district court's view of the evidence.

As a threshold matter, Ms. Rickard respectfully submits that appellate jurisdiction is lacking in this matter, as the Sixth Circuit appropriately determined. Pet. App. at 12 ("whether we call it a dismissal for lack of jurisdiction or an affirmance of the denial of qualified immunity, the result is the same.") Procedurally, this case came to the Sixth Circuit as an interlocutory appeal of a finding which ultimately challenged the district court's reading of the factual evidence, pursuant to this Court's holding in *Johnson v. Jones*, 515 U.S. 304 (1995). The Petitioners may have glossed their contentions with perfunctory claims that the law was not clearly established, but the reality is that they were taking issue with the district court's reading of the facts. *See*, Relevant Documents, Ms. Rickard's Motion to Dismiss for Lack of Jurisdiction, 5/16/11, and Reply 6/1/11. Nevertheless, after initially dismissing the appeal, the Court of Appeals ultimately gave Petitioners the panel appeal they sought.

Pursuant to *Johnson v. Jones*, a determination that genuine issues of material fact create disputes

which preclude the defense of qualified immunity is not immediately appealable. Accordingly, Ms. Rickard respectfully reiterates that the Court of Appeals did not have jurisdiction over the instant appeal. A review of the Petitioners' submissions to the Court of Appeals illustrate why the instant appeal lacked subject matter jurisdiction. Petitioners' primary argument on appeal was a disagreement with the factual conclusions contained in the district court's order denying them qualified immunity. This attempt to question the evidentiary sufficiency of the district court's findings based on the record on interlocutory appeal was prohibited by this Court's opinion in *Johnson v. Jones*. The Petitioners clearly attempted to base their interlocutory appeal on the evidentiary sufficiency of the record in this case, and, although the Court of Appeals granted the Petitioners the appeal they sought after initially dismissing the appeal, it ultimately appropriately affirmed the district court in this case. Pet. App. at 12.

Because appellate jurisdiction does not extend to fact-based disputes, the Sixth Circuit properly affirmed the district court's order denying the Petitioners qualified immunity. It is worth noting, if only in passing, that the United States as amicus curiae takes the position that resort to *Johnson v. Jones* does not address the issue of whether clearly established law was violated, but the reality is that the issue of whether the Fourth Amendment has been violated can be (and in this case is) interrelated with the issue of whether there has been a violation of

clearly established law. That is because the key disputed issue is the degree of threat Mr. Rickard posed to police. In other words, the legal question can be dependent upon which view of the facts the jury believes. If the jury determines a police officer has shot an unarmed, nondangerous suspect without a reasonable belief that he posed a significant threat of death or serious injury, the officer will have violated the Fourth Amendment and clearly established law. Conversely, if the jury believes the officer's version of events and finds the suspect was a significant threat, the officer will likely be found to have used deadly force appropriately. The analysis of *Tennessee v. Garner*, 471 U.S. 1, 9-12 (1985) dictates this by forbidding the use of force on a suspect who is not a threat, but, in almost the same breath, authorizing the use of force on a suspect who *is* a threat. For this reason, cases have turned on the issue of whether and/or the degree to which the suspect was a threat. This case does as well.

B. Factual disputes in this case as to the alleged aggravated assaults, claimed "rammings," and ultimately the degree of threat Mr. Rickard represented impact not only the issue of appellate jurisdiction, but also whether the force used in this case was in violation of the Fourth Amendment, and whether clearly established law was violated.

Without waiving the position that the Court of Appeals did not have jurisdiction, Ms. Rickard provides the following in response to the arguments of Petitioners and their amici. Certain basic facts in this case are not in dispute, particularly since video "dash-cam" evidence[1] depicts most of the events. There is no dispute that there was a chase. There is no dispute that there was a shooting and Mr. Rickard and Ms. Allen were killed. However, as to some of the more detailed aspects of those facts, there are significant disputes that have not yet been developed for this Court.

Although it is lengthy, detailing the disputes is important because of some of the specific contentions the Petitioners have made (particularly as to what the facts are), and Ms. Rickard is providing additional

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[1] It should be noted that the time counters on the three different dash-cam videos from Units 279, 284 and 286 were not synchronized, and in fact have variances between them of as much as approximately one hour. However, there is no dispute that the events began around midnight on July 18, 2004.

facts not provided by Petitioners, including their own testimony. Many of these facts are also visible from the video evidence. The testimony of Petitioners Vance Plumhoff and Joseph Forthman (the only two witnesses who have been deposed) and the video evidence factored into the denial of qualified immunity, which the Sixth Circuit affirmed.

In summary, a review of the video evidence and the testimony of the two officers reveals that the claimed aggravated assaults are not substantiated on the video and the degree of threat at the time deadly force was used was not as Petitioners now contend. More simply, the video evidence and testimony serve to undermine the version of the facts claimed by Petitioners. The existence of the factual disputes relates not only to the issue of whether excessive force was used in violation of the Fourth Amendment, but also whether a violation of clearly established law occurred. *See*, *e.g.*, *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), *reh'g den.*; *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2009), *cert. den.*, 559 U.S. 1007; *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005); and *McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999), discussed additionally below at III H and K. The key difference is ultimately in the degree of threat Mr. Rickard posed, which depends on the accuracy of the Petitioners' factual claims.

C. Dispute as to whether the claimed aggravated assaults actually occurred.

A justification offered by the Petitioners for continuing the chase and for the shooting in Memphis is that Donald Rickard committed aggravated assaults against various officers by attempting to ram them. A review of the video evidence (principally the Unit 279 video) and the testimony of the officers reveals that the district court below properly found genuine issues of material fact as to whether the aggravated assaults actually occurred as described.

While the chase was on Interstate 40, the officers claimed that Rickard attempted to ram police vehicles, which was the basis for the claims that he committed aggravated assaults. However, the video evidence shows (and it is admitted in deposition testimony) that there was no contact between the vehicles on I-40.

Specifically, Officer Plumhoff identified the first [alleged] aggravated assault, but Forthman does not know what that action was. Depo. of Forthman, at 68; JA 262-63. On I-40, it is Forthman's understanding that there was never any contact between the Rickard vehicle and any of the police vehicles [during the events represented to be aggravated assaults]. Depo. of Forthman, at 69; JA 263.

Officer Plumhoff, referring to the place on the videotape in which Plumhoff stated that Rickard "just tried to ram me," testified that Lieutenant Forthman's [Unit 279] tape shows where it happened, but "(t)he

yellow strobe on my vehicle pretty well washes out the detail." Depo. of Plumhoff, at 41; JA 351. [One] cannot see the event well on any of the three tapes. Depo. of Plumhoff, at 41; JA 351. [One] can see the Rickard vehicle come over to the right, but with the yellow strobe, it is hard from the video to determine the exact proximity. Depo. of Plumhoff, at 41; JA 351-52.

D. Another alleged aggravated assault – lane changing.

Officer Forthman identified the second aggravated assault (still on I-40) as a time when the Rickard vehicle "just happened to be going from one lane to another when he used his vehicle intentionally to keep – or, to even run Officer Evans off the road to keep him from going past him." However, Rickard did not run Officer Evans off the road. Depo. of Forthman, at 101-102; JA 277-78. Forthman could not tell from his vantage point how far the Rickard vehicle was in front of the Evans vehicle at the time Rickard changed lanes. Depo. of Forthman, at 107-108; JA 279-80. He did not know what the speed of the Rickard vehicle was when he changed lanes. Depo. of Forthman, at 108; JA 280. Forthman could not tell how far Evans moved to the left. Depo. of Forthman, at 108; JA 280. There is such a charge as an improper lane change; that is a misdemeanor. Depo. of Forthman, at 110-111; JA 282.

In concluding that a felony had just occurred, Forthman made the judgment that Rickard tried to ram Evans and Forthman without knowing the proximity of the vehicles to each other. Depo. of Forthman at 112; JA 283-84. Watching it on video in his deposition, Forthman could not answer whether it was an improper lane change because of the quality of the video and because he could not tell whether Rickard had his "blinker" on. Depo. of Forthman, at 113; JA 284-85.

E. Hearsay of another alleged aggravated assault.

Forthman heard one of the other officers say near a weigh station on I-40 that there was a vehicle assault, and from that, Forthman concluded that act converted the situation from a misdemeanor to a felony. Depo. of Forthman, at 84l; JA 269. The felony was an aggravated assault. Forthman did not know what the maneuver was, but he heard one of the other officers say it. Depo. of Forthman, at 84; JA 269-70.

F. Other claimed attempted rammings on I-40 not substantiated on the video.

Officer Plumhoff identified another incident at 11:11:43 on the time counter [Unit 279] at which it appeared to Plumhoff that Rickard had tried to ram a car. However, Plumhoff could not tell how far the officer was from those vehicles, and Plumhoff did not

know how far Plumhoff was from Rickard at that point. Depo. of Plumhoff, at 115; JA 382-83. Officer Plumhoff identified another time at which he claimed Rickard came over to the left toward Plumhoff when Plumhoff was trying to get past Rickard on the left, and Plumhoff had to drop back a little bit. That was at 11:12:40, but "the video is really not useful here" for that. Depo. of Plumhoff, at 116-117; JA 383-84.

G. Actual contact between vehicles: the Rickard vehicle was first hit from behind by a police vehicle, and other alleged "rammings" were disputed as not showing on the video evidence.

Although there was no contact between the vehicles on I-40, the video evidence does show contact once the vehicles crossed into Memphis. The Petitioners allege multiple times in their brief that the Rickard vehicle "rammed" the vehicles driven by Officers Plumhoff and/or Gardner. For example, at page 3 they indicate that Rickard "repeatedly rammed" Officer Gardner. At page 7 of their brief they identify (vaguely) what officers believed "appeared to them" to have been attempted rammings. Describing an incident in which there is undeniably contact between police vehicles shown on the video evidence, at page 8 of their brief they indicate that the Rickard vehicle was hit by a pursuing vehicle. That is a correct characterization of what occurred at 12:17:34-:36 on the Unit 286 video time counter, as the police vehicle struck the Rickard vehicle from behind, but that is

obviously different from the idea that Mr. Rickard "rammed" anyone. The connotation of the word "ram" necessarily implies intent on the part of Mr. Rickard to strike another car, which was not possible from Mr. Rickard at that time as shown on the Unit 286 video. At page 9 of their brief Petitioners again state that Rickard "rammed" the vehicle driven by Gardner, which they repeat on pages 37 and 39. They also state at page 27 that Mr. Rickard "rammed" into two separate vehicles, presumably referring to contact with Plumhoff and then Gardner.

H. A rear-end impact led to a collision with Plumhoff.

The problem with that repeated contention for Petitioners is that, respectfully, the video evidence does not support it. There is contact between vehicles, but not the kind that would fit the connotations of stating that Mr. Rickard "rammed" any of the vehicles. The video evidence also shows that the first [rear-end] contact noted above was actually the impetus for the second contact with a police vehicle, which was the contact between Mr. Rickard and the vehicle of Officer Plumhoff. That occurred as both vehicles were moving forward [Unit 286 video, at 12:17:34-:36], and is discussed more thoroughly below.

I. The alleged ramming of Officer Plumhoff's vehicle.

Again, notwithstanding the Petitioners' statements that Rickard "rammed" Officer Plumhoff's vehicle, the video and the testimony of the officers indicate that what more likely happened was that because Rickard was struck from behind by a police vehicle, that contact caused him to spin out, and the momentum carried the Rickard vehicle into contact with Officer Plumhoff's vehicle, while both were moving forward.

The testimony of Officers Forthman and Plumhoff is significant. With the [279] video stopped at 11:14:17, Forthman testified that Rickard had already "rammed" Officer Plumhoff's car. However, that does not show on the [279] camera. Depo. of Forthman, at 134; JA 298. As far as Forthman knows, it could have been both vehicles moving that struck when they struck. Depo. of Forthman, at 135; JA 299.

Plumhoff also believes the impact between the Rickard vehicle and his vehicle does not show on the [Unit 279] video. Depo. of Plumhoff, at 118; JA 385. However, Plumhoff believes that impact is partially shown on the camera of officer Galtelli [Unit 286]. Depo. of Plumhoff, at 119; JA 299. Plumhoff does not know whether Rickard hit other police vehicles or they hit him, but he spun out subsequent to some contact between vehicles. Plumhoff knows that. Depo. of Plumhoff, at 142; JA 396.

In fact, the Unit 286 video, at approximately 12:17:37, depicts the Rickard car moving forward from momentum created when it spun out after being struck by another police car and *then* colliding with Plumhoff's vehicle (which was also moving forward) rather than Rickard intentionally "ramming" Plumhoff at all. At a minimum, based upon the testimony and the cited portion of the Unit 286 video, reasonable minds could differ as to whether that claimed "ramming" right before the shooting was a "ramming" at all.

J. Video of the Rickard and Gardner vehicles in contact with each other.

The final contact between police vehicles and the Rickard vehicle (just before the first shots were fired) was between the Rickard vehicle and the vehicle of Officer Gardner. The Petitioners contend Rickard repeatedly rammed Gardner. However, a review of the Unit 279 video at 11:14:22 on the time counter indicates that the first contact between the vehicle of Officer Gardner and the vehicle driven by Mr. Rickard occurred as both vehicles were moving forward toward each other simultaneously, at visibly low speed. The same is true of the contact shown on the Unit 286 video at 12:17:43. Both vehicles are moving forward toward each other, but at low speed and within a tight space. This is not properly characterized as a "ramming" by Mr. Rickard, nor is it properly characterized as "reckless" maneuvering by the United States as amicus curiae at page 19 of its

amicus brief. It is, however, a slight move forward, as the United States indicates at page 4 of its brief.

The videos also show that the rest of the brief interaction between those two vehicles did not involve "repeated ramming." The videos go on to show that once the Rickard and Gardner vehicles were in contact with each other by 11:14:22 on the Unit 279 video and at 12:17:43 on the Unit 286 video, the vehicles remained in almost complete contact, bumper to bumper for the next few seconds, until Officer Plumhoff fired his three shots and then the Rickard vehicle began backing away and around the officers to drive away from them. While the Rickard and Gardner vehicles were in contact with each other it is true that the Rickard vehicle did rock briefly and the wheels did intermittently spin. However, Rickard did not (as the word "rammed" would imply) pull back appreciably and then drive forward with force into Gardner again, and to suggest that he did that "repeatedly" is not borne out by the video [Unit 279 video at 11:14:22-:25, and Unit 286 video at 12:17:43-:46].

The importance of these points about the word "rammed" goes beyond mere semantics, because significant connotations underlie the Petitioners' contentions that Rickard "repeatedly rammed" police cars, as though it were a unilateral act. True "rammings," had Rickard gathered up a head of steam and struck stationary police vehicles "repeatedly" as they contend, would seemingly represent a greater degree of threat.

The video and the testimony indicate, however, that the collision with Plumhoff's vehicle occurred while both cars were going forward, and the collision with Gardner's vehicle is similar: both vehicles were moving forward toward each other at low speed and Gardner actually appeared to be moving more forward than Rickard on the Unit 286 video. Officer Gardner has yet to be deposed in this case; although he tendered an Affidavit, he has not been subjected to cross-examination.

K. Dispute as to whether the officers who fired shots reasonably perceived a threat to themselves, fellow officers or the public, particularly once the vehicle backed away in a semicircle and headed past the officers.

The most significant disputed issue is whether the officers who fired shots (Plumhoff, Gardner and Galtelli) reasonably perceived a threat to themselves, fellow officers or the public so as to justify the firing of a total of 15 gunshots at the vehicle. Notwithstanding the description of the videos by the Petitioners, a review of the video from Unit 279 in particular reveals that the vast majority of the gunshots were fired into or at the vehicle after it had backed away from the officers in a semicircle and had begun to proceed eastbound on Jackson Avenue, just seconds before the driver lost control (presumably from multiple gunshot wounds) and crashed into a house. This Court noted the likelihood of this kind of outcome

(a crash following shots at a moving car) in *Scott v. Harris*, 550 U.S. 372, 384, specifically citing *Vaughan v. Cox*, 343 F.3d 1323, 1326 (11th Cir. 2003) (denying qualified immunity due to police gunfire at a moving vehicle).

L. Video evidence when the first shots were fired.

The Petitioners indicate that Plumhoff fired the first three shots because of the threat posed by Rickard. However, this is not consistent with Officer Plumhoff's own testimony upon his review of the video. Looking at the tape [from Unit 279], Plumhoff testified that he could see he was [actually] between the front edge of the front tire well and the right front corner of the front bumper of the Rickard vehicle, slightly to the side and *not in front of the Rickard vehicle*. Depo. of Plumhoff, at 124-125; JA 387-88.

In fact, a review of the Unit 279 video reveals plainly that Plumhoff was to the side of the right front wheel of the Rickard vehicle rather than facing the front of it directly, and clearly not in the path the Rickard vehicle would have taken had it moved directly forward. Contrary to the Petitioners' arguments at page 10 of their brief that he "could have" run over officers, at that instant the Rickard vehicle could not go forward toward Plumhoff because it was in contact with Officer Gardner's vehicle. This is significant because a recurrent theme of the Petitioners' contentions is that the subjective perceptions of

the officers – right or wrong – trumps the ultimate inquiry of objective reasonableness. Ms. Rickard acknowledges statements in case law according a measure of deference to officers' actions when events unfold quickly; however, such a consideration, taken to the extreme, would emasculate the inquiry of objective reasonableness. Although the speed of the events is a factor, the invocation of a rote "that's how it looked to me" is not an absolute defense to any challenge to objective reasonableness in an excessive force claim. While the officers' perceptions are part of the inquiry under the totality of the circumstances, their subjective reactions or beliefs do not preclude or completely control a review of objective reasonableness, particularly when video evidence does not support it.

M. The Petitioners' claims that Rickard nearly backed over Officer Ellis and struck the hand of Officer Evans.

The Petitioners also state multiple times in their brief that Rickard "nearly backed over" or "nearly ran over" Officer Ellis, e.g., at pages 10, 25, 27, 37, and 39 of their brief to this Court. However, a review of the Unit 279 video at 11:14:28 demonstrates that Officer Ellis took just one step to his right to avoid the vehicle as it was backing. In other words, contrary to the implications of the statements that Rickard "nearly backed over" or "nearly ran over" Officer Ellis, with connotations of a dramatic run and leap or dive to safety just in the nick of time, Officer Ellis needed

only one step away from the path of the vehicle. He has also not been deposed in this case yet.

On a similar note, Petitioners state at page 9 of their brief to this Court that Mr. Rickard "struck [Officer] Evans's right hand with some part of the Honda." Respectfully, that is not consistent with what they stated to the Sixth Circuit. For example, in their initial brief to the Sixth Circuit, at page 6, they referred to such contact as "not plainly visible on the video." At page 12 of that brief they referred to the vehicle as "reportedly" striking the hand of Officer Evans, at the bottom of page 19 of their original Sixth Circuit brief they stated the vehicle "may have struck" his hand, and at the top of page 22 of that same brief they stated "the Honda arguably struck" his hand. Officer Evans has not been deposed in this case.

N. The ten shots fired by Officer Gardner and two shots fired by Officer Galtelli.

The Petitioners correctly indicate in their brief to this Court that Officer Gardner (who has not been deposed) fired ten shots and Officer Galtelli (who has also not been deposed) fired two shots. They omit the testimony of Officer Forthman about the circumstances of those shots. At 11:14:31 on the [Unit 279] video Officer Gardner has just fired his first shot. Depo. of Forthman, at 154; JA 306. Forthman believes 11:14:31 is [also] the time the Rickard vehicle moved from going in reverse to going forward. Depo.

of Forthman, at 156; JA 307-08. Forthman testified that it is known [from the Unit 279 video in Forthman's car] that basically all of the ten shots fired by Gardner were during the time the car was moving forward [which was away from the officers]. Depo. of Forthman, at 158; JA 309. **When that car started going in the other direction [forward], it was not a threat to the people behind the car.** Depo. of Forthman, at 158; JA 309.

O. The severity of the crime prompting the initial traffic stop was low.

At the time Officer Forthman pulled the Rickard vehicle over, and when it ran, the only thing wrong was that there was a bad headlight and a broken front windshield. Depo. of Forthman, at 38; JA 245-46. A headlight out and a broken windshield would be misdemeanors. Depo. of Forthman, at 43; JA 248.

P. Rickard and Allen were not armed, and the officers pursuing them were not told the initial charges when initiating and continuing the chase.

Forthman agrees that Mr. Rickard did not have a gun that night, nor did [the passenger] Ms. Allen. Depo. of Forthman, at 187; JA 319. None of the officers that night said to Forthman that they were armed or they pulled a gun or it looked like they were going to shoot the officers. Depo. of Forthman, at 188; JA 319-20. The West Memphis Police Department's

Policy and Procedures concerning Police Pursuits, Chapter 2, Section 16, page 3 (JA 401), required the primary unit involved in a pursuit to advise of the reason for the pursuit, including crimes or violations committed. However, the testimony and the video evidence indicate the involved officers were never told the initial charges during the chase. At no point during the pursuit did Forthman tell the other officers that the fleeing car was [initially] stopped for having a headlight out and a broken windshield. Depo. of Forthman, at 62; JA 256. One of the primary things an officer is supposed to use in making the judgment to continue a pursuit is [a weighing of] the seriousness of the committed offense against the danger of the pursuit. Depo. of Forthman, at 63-64; JA 258. However, Officer Dykes [a supervisor not in the chase] and Officer Plumhoff were not able to make that judgment because they did not know what the offense was. Depo. of Forthman, at 64; JA 258.

II. PETITIONERS WERE PROPERLY FOUND NOT TO BE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEIR USE OF DEADLY FORCE WAS NOT OBJECTIVELY REASONABLE.

A. *Tennessee v. Garner.*

Ms. Rickard agrees this is a Fourth Amendment issue, and that case law from this Court indicates the issue is one of objective reasonableness. *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985). The Petitioners argue their conduct

was objectively reasonable as a matter of law. This is belied by the many fact disputes noted in this case based on the video evidence and the testimony.

In 1985, 19 years before the events of this case, this Court stated the following about shooting a nonviolent fleeing suspect:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

471 U.S. 1, 11-12 (1985). This Court added that where a suspect threatens an officer with a weapon or provides probable cause to believe he poses a threat of serious physical harm, deadly force may be used to prevent escape. Id. at 12.

This Court's statements in *Garner* not only articulated a bedrock governing Fourth Amendment principle, but also this Court's word on what was "clearly established" law as soon as the ink was dry on the opinion in March of 1985: it is constitutionally unreasonable to shoot an unarmed, nondangerous fleeing suspect to prevent his escape.

In reaching its decision, this Court in *Garner* addressed the type of considerations that prevail in cases to this day, specifically balancing the nature and quality of an intrusion by police on an individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. 471 U.S. 1, 8. This Court determined that the intrusiveness of a seizure by means of deadly force is unmatched, Id. at 9, and that the use of deadly force frustrates the interest of the individual and of society in judicial determination of guilt and punishment. Id. This Court indicated it was not persuaded that shooting nondangerous fleeing suspects was so vital as to outweigh the suspect's interest in his own life, as the use of deadly force is a self-defeating way of apprehending a suspect because, if successful, it guarantees the criminal justice mechanism will not be set in motion. Id. at 10-11.

At its most basic level, this is a case about the shooting of an unarmed man and woman who drove away from police at a misdemeanor traffic stop in July of 2004. Most of the 15 shots were fired moments later at a moving vehicle as Mr. Rickard drove away from the officers.

B. The force used was not warranted by *Garner*.

Even as they argue to this Court that *Garner* is too general to have provided clearly established law in this case 19 years after *Garner* was decided,

Petitioners also seek to convince this Court that their actions were nevertheless objectively reasonable in light of *Garner*. Indeed, at page 39 of their brief, Petitioners state that because of the threat Mr. Rickard posed, "*Garner* applies." They contend that the videos demonstrate their actions were reasonable. At a minimum, reasonable minds could differ on the issue of the Petitioners' objective reasonableness, and the courts below did not err in this regard.

It is significant to note that a Shelby County, Tennessee grand jury indicted the three officers who fired their guns (Plumhoff, Gardner and Galtelli) for reckless homicide in the death of passenger Kelly Allen. *State of Tennessee v. Galtelli, et al.*, 2008 Tenn. Crim. App. LEXIS 80 (Tenn. Ct. Crim. App., Feb. 13, 2008), at * 1-2.[2] Although the Petitioners contend that Rickard was "reckless," and the United States as amicus curiae takes up that cry, e.g., at page 19 of its brief, the district attorney general in the State of Tennessee ultimately took the position that it was the three officers who fired their weapons who showed reckless behavior and disregard for innocent citizens. Specifically, the district attorney general contended that the interests of justice weighed against granting the officers pretrial diversion, emphasizing the importance of having people in a community feel they

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[2] Although the records of the criminal cases against the Petitioners may have been expunged, Tenn. Code Ann. § 40-32-101(b)(2) provides that the "public records" to be destroyed in the expunction process do not include appellate court opinions.

are "protected by their law enforcement officers and not threatened by them." Id. at * 11.

The district attorney general added:

> The reckless nature of the offense resulting in the death of the victim, the fact that the [Defendants were] acting under the color of law, the fact that citizens should feel protected by and not threatened by law enforcement, the damage that this type of criminal behavior does to the judicial system, the need to put law enforcement on notice that this type of behavior will not be tolerated and the need to deter this type of behavior, the need to insure the community that this type of behavior will not be tolerated when weighed against the Defendant[s'] social history and work history indicate that pre-trial diversion is not the appropriate remedy in this case and would not be in the interest of justice.

Id. at * 12-13.

For the sake of accuracy, it is important to note that ultimately, the Tennessee Court of Criminal Appeals did affirm the trial court's order reversing the denial of pretrial diversion. Id. at * 27. However, the fundamental point remains: the State of Tennessee found the conduct egregious enough to warrant criminal indictments; yet the Petitioners contend their conduct should have been found reasonable as a matter of law.

In the face of the factual disputes noted in this case, the Petitioners' justifications such as the claimed aggravated assaults, attempted rammings, and threat in the parking area off of the highway fail. Although they specifically contend that the threat began again as Mr. Rickard backed up and tried to drive away, Officer Forthman's testimony undermines this. It was not reasonable to fire any of the 15 shots in this case.

C. The findings of the district court are based upon disputed facts.

The district court also rejected Petitioners' contentions that their conduct was reasonable as a matter of law, and the Sixth Circuit affirmed. On this issue, the district court found that the various alleged attempted rammings were not clearly demonstrated on the video evidence. Pet. App. at 36-38. Once the Rickard and Gardner vehicles were in contact with each other in Memphis, the district court noted that there was a dispute as to whether the Rickard vehicle's engine was "revving" or rocking back and forth, and whether engine noise in conjunction with a rocking motion should be characterized as a "revving." Pet. App. at 23, 40. With regard to the shooting, the district court found that the video from Unit 279 showed that Plumhoff was near the passenger side of the vehicle when he fired, and the district court indicated that [Gardner] then fired all ten of his shots while the vehicle was moving forward, away from the officers. Pet. App. at 24, 35. With regard to

the Petitioners' claims that the officers' actions were objectively reasonable, the district court found that the undisputed facts did not support that assertion. Pet. App. at 35. The district court specifically indicated that the officers did not believe the suspects were armed; the suspects were initially stopped because of an inoperable headlight; and they were driving away from the officers when the shots were fired. Thus the severity of the crime at issue was low and the suspects posed little immediate threat to the officers or others. Although the suspects were fleeing arrest, that factor alone was insufficient, per *Garner*, to support a finding that deadly force was reasonable. Pet. App. at 35-36. The district court observed that there was no contact between the vehicles on I-40 and the dashboard camera video shows only lane changes and swerving, and it is difficult to tell from the video what the proximity of the vehicles was to each other. Pet. App. at 36, 38.

The district court specifically addressed a series of cases, focusing on the use of force by police in response to claimed threats. The district court cited *Smith v. Cupp*, 430 F.3d 766, 770 (6th Cir. 2005), in which an officer shot a fleeing suspect who had stolen a police cruiser, asserting that he fired because the vehicle "was bearing down on them." The officer in *Smith* claimed that the suspect "rapidly accelerated directly at [him] and [another officer]" and he fired. The district court noted that the Sixth Circuit in *Smith* found that "[e]ven viewing the events in the heat of the moment, without 20/20 hindsight, a jury

could conclude that a reasonable officer in [the officer's] position was never in any danger." Id. at 774. The district court indicated that with regard to Mr. Rickard a reasonable jury could also determine that the belief that danger was imminent was not reasonable. Thus, granting summary judgment based on the absence of a constitutional violation would be inappropriate. Pet. App. at 40.

In finding the force in this case not to be objectively reasonable, the district court also contrasted the conduct of Mr. Rickard to the suspect in *Scott v. Clay Cnty., Tenn.*, 205 F.3d 867, 872, 878 (6th Cir. 2000) (finding that deadly force was reasonable as a matter of law against an unarmed fleeing suspect where, after leaping out of the car's path, the officer fired on the fleeing car as it turned directly toward another police cruiser), and with *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (finding that deadly force was not unreasonable as a matter of law where suspect had attempted to ram a cruiser, was cornered, sped forward, and crashed into a police cruiser that was blocking his escape, and was speeding up a street toward a roadblock manned by other officers). Pet. App. at 40. The district court also noted *Vaughan v. Cox*, 343 F.3d 1323, 1327, 1330 (11th Cir. 2003) (finding that district court erred in granting officer qualified immunity where officer contended that he fired during a pursuit because the suspect swerved as if to smash into his cruiser because a reasonable jury could find that fleeing suspect did not present an immediate threat), and *Sigley v. City of Parma*

Heights, 437 F.3d 527, 536 (6th Cir. 2006) ("[W]here there are contentious factual disputes relating to the reasonableness of an officer's use of deadly force, the court is precluded from granting summary judgment for [the] officers. . . ." Pet. App. at 41.

D. This Court should not decide that there is a blanket rule authorizing police officers to shoot a suspect in a vehicular chase to prevent escape.

This is a case about the firing of 15 total gunshots into a car which contained an unarmed man and an unarmed woman, initially stopped because of a headlight. Petitioners argue that their conduct was reasonable as a matter of law, based upon *Scott v. Harris* (authorizing the ramming of a fleeing vehicle to stop a chase but differentiating ramming from shooting) and *Sykes v. United States*, 564 U.S. 1 (2011) (finding that fleeing from police in a vehicle is a "violent felony" for sentencing purposes). They contend that this Court would not be extending *Scott v. Harris* by transferring its authorization of deadly force to a shooting case, or that it would only be a "narrow" extension of *Scott v. Harris* to apply it to these facts. Stated simply, they seek to stretch *Scott v. Harris* (and Fourth Amendment jurisprudence, which is necessarily fact-specific) much too far.

The Petitioners specifically contend that *Scott v. Harris* is "similar enough" to this case for the force to be found reasonable, but *Scott v. Harris*, as Ms.

Rickard has previously observed to this Court, is fundamentally different from this case. As Ms. Rickard noted in her Response to the Petitioners' Petition at pages 17-19, this Court itself noted in *Scott v. Harris* that a ramming is different from shooting a suspect. 550 U.S. at 383 (noting that a police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person).

When the arguments of the Petitioners and their amici are pieced together to form their inevitable conclusion, it becomes clear that they seek a blanket rule that the level of force utilized in this case is permissible and justified *as a matter of law because Mr. Rickard fled in a vehicle*. The rule they advocate for without quite saying so, lest it seem too overtly transparent, is that a suspect's flight in a vehicle triggers an *automatic* right to use deadly force.

Respectfully, this takes the line too far. Fourth Amendment jurisprudence, by its inherent nature, does not support such a blanket rule. This Court said as much in *Scott v. Harris*, indicating that in Fourth Amendment cases, "in the end, we must still slosh our way through the fact bound morass of reasonableness." 550 U.S. 372, 383. It was that exact point which led Justice Ginsburg, in her concurring opinion in *Scott v. Harris*, to indicate that the majority's opinion in *Scott v. Harris* should not be read "as articulating a mechanical, per se rule." Rather, the inquiry is "situation specific." 550 U.S. 372, 386 (Ginsburg J., concurring).

The infirmity of a blanket rule is actually illustrated by some of the Petitioners' own points. For example, at page 14 of their brief they argue that it was objectively reasonable for the officers to conclude Rickard was a danger not only to them but also "to himself" and his passenger. Although the initial stop was for a misdemeanor, because the two fled in a vehicle, the Petitioners ask this Court to approve the shooting as a matter of law (ostensibly that they had to *shoot* him repeatedly to protect him from himself).

In a different vein, at page 43 of their brief, the Petitioners come back to the same ultimate point of seeking a blanket rule by arguing that it was imperative that Rickard and Allen not be allowed to escape. Specifically, they offer a series of speculative possibilities, e.g., that Rickard "may have continued to drive recklessly," and he "might not have believed" the chase was off if officers stopped chasing. Although Ms. Rickard acknowledges that this Court provided parallel analysis in *Scott v. Harris*, the point remains that because there was a chase, the Petitioners are urging this Court to transfer the authorization of force held permissible in *Scott v. Harris* (a ramming) to a shooting situation in this case, which is fundamentally different. Mr. Rickard attempted to use the vehicle to escape. The Petitioners insist it was used (or attempted to be used) as a deadly weapon, but the district court found disputed issues, and the Court of Appeals, in reliance upon the video evidence based upon this Court's indication in *Scott v Harris* that it could rely on that evidence, appropriately affirmed.

Bearing in mind that traditional summary judgment analysis hinges on genuine issues of material fact, this Court's decision in *Scott* specifically addressed the resort to video evidence as a way to assess whether one party's version of events can be disregarded as "blatantly contradicted" in a qualified immunity case. Of course this Court did not indicate that video evidence will necessarily be per se dispositive evidence in all such motions for summary judgment. However, the danger in taking *Scott v. Harris* too far is to construe it as a judicially created "video exception" to the right to trial by jury. That is particularly true where – as in this case – the video undermines the version of events given *by the Petitioners*. The State of Tennessee – and the courts below – found the Petitioners' conduct to be something other than reasonable as a matter of law.

E. The fact that a chase in a vehicle occurred should not serve by itself to become a legal means of bootstrapping that fact into an unbounded and outright justification for the use of deadly force.

The Petitioners argue to this Court at pages 41-43 of their brief that a chase involving police is, by legal definition, a dangerous or violent felony. This would operate to convert someone who is not actually violent into someone who "is" by operation of law. However, a bootstrapping by operation of law to determine that Mr. Rickard was guilty of a dangerous

or violent felony just because he fled in a vehicle cannot be the foundation for a conclusion that he forfeited a right to live in favor of an expedited execution, particularly as a means of sidestepping disputed issues of fact. This Court rejected such a contention in *Garner*, *supra*. 471 U.S. 1, at 14 (indicating that the common law concept that deadly force was merely a speedier execution of one who had already forfeited his own life had always been questionable). The protections of the Fourth Amendment should not be forfeited merely because flight took place in a vehicle.

The conclusory contentions of the Petitioners that Mr. Rickard threatened them brings the issue into focus. Mr. Rickard did not threaten officers with a weapon. He did not have one. It is a subjective and unilateral argument that he *may* have attempted to attack because he was in a vehicle, but that contention goes precisely to the heart of how and why the degree of threat he posed is disputed. The Petitioners have *claimed* that Mr. Rickard attempted to attack them, but those acts are not borne out by the video, which the officers themselves have had to concede in their own testimony.

Their argument then defaults back to the position that shooting Mr. Rickard was justified because he fled in a vehicle, which is the inherent problem with bootstrapping by operation of law in the face of disputed facts to convert him into a "violent felon" who can then be shot for fleeing *because he fled in a vehicle*. The degree of threat Mr. Rickard presented therefore becomes central on both the issue of whether

a constitutional violation occurred and a violation of clearly established law: if Ms. Rickard's version of the facts is accepted, the dispute requires jury resolution. If the Petitioners' facts are accepted, it would not. The Petitioners' factual contentions, however, are undermined not only by the video evidence but also by their own testimony.

The extent to which Petitioners seek to bootstrap the fact that Mr. Rickard was fleeing in a vehicle in order to convert it into an ultimate justification for a shooting is illustrated by the fact that they refer to "dicta" from this Court's opinion in *Sykes v. United States*, 564 U.S. 1 (2011). On the issue of sentencing, *Sykes* is authority for the proposition that fleeing from police in a vehicle can be classified as a violent felony. However, it is a comparison of apples to oranges to apply *Sykes* to the Fourth Amendment setting in qualified immunity analysis. Only this Court can say if *Sykes* can be extended in the manner the Petitioners request. However, the problem with that, when combined with *Scott v. Harris*, is that to do so would be to lay down a blanket rule that effectively emasculates the Fourth Amendment in a manner inconsistent with the basic underpinning of *Garner*. It would be the per se forfeiture of life due to vehicular flight while disregarding factual issues, or, as the majority phrased it in *Lytle v. Bexar County*, 560 F.3d 404, 414 (5th Cir. 2009), discussed at III H, *infra*, a declaration of "open season" on suspects fleeing in vehicles.

F. The degree of force was excessive.

Although Petitioners attempt to dismiss the issue with a single footnote that only addresses the "clearly established" law prong of the qualified immunity analysis and a statement at page 29 of their brief that the number of shots is "constitutionally irrelevant," the degree of force utilized is important. This case involved 15 total shots at a vehicle containing an unarmed man and woman, the majority of them as the car went past and away from police. At that point, as Officer Forthman testified, the vehicle was not a threat to the officers behind the vehicle. This Court's per curiam opinion in *Brosseau v. Haugen*, 543 U.S. 194 (2004), indicated that one shot fired at a suspect seeking to escape in a car was in the "hazy border" between excessive and acceptable force. The operative concept in this area of litigation is the avoidance of "excessive force," and not a blanket authorization of the use of *unlimited* force. The fact that such a hazy border exists necessarily presupposes that it can be crossed.

At page 28 of their brief, Petitioners cite a handful of cases in a footnote, contending that it was not clearly established that officers do not have the right to use deadly force until a threat is eliminated. They argue, in effect, that *no* amount of force is excessive once the right to use it arises. However, a more detailed examination of the cases Petitioners cite reveals a series of critical distinctions, ultimately boiling down to a significant difference in the degree of threat posed to the officers. Stated more simply, the

cases cited by Petitioners involved a much greater – and [illegible] readily demonstrable – degree of direct threat to police officers than in this case.

For example, the Petitioners quote *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996) (the only case among those cited on this issue predating 2004), for its indication that if it was objectively reasonable for officers to use deadly force [22 gunshots], it was reasonable for them "to continue firing until they were sure the threat to their lives had ceased." In *Elliott*, the threat posed by the intoxicated suspect was a gun pointed directly at officers with Elliott's finger on the trigger a few feet away inside a patrol car. Id. at 642. Unlike Elliott, in this case Rickard was not armed and was not facing the officers when they shot him. The Petitioners cite other cases involving suspects with guns, unlike Mr. Rickard. *See, e.g.*, *Estate of Rodgers v. Smith*, 188 Fed. Appx. 175 (4th Cir. 2006) (Rodgers was *known* to be armed and considered dangerous because he had abducted his ex-girlfriend at gunpoint a few hours before the shooting, and video evidence demonstrated that a gun actually fell from his hand during the shooting sequence); and *Jean-Baptiste v. Gutierrez*, 627 F.3d 816 (11th Cir. 2010) (after a brief chase, Officer Gutierrez turned a corner and faced Jean-Baptiste, who was holding a gun, at a distance of eight to ten feet. Id. at 819. Officer Gutierrez fired 14 shots. Jean-Baptiste had a nine millimeter gun with the safety lock disengaged, the hammer partially cocked, and a 12 round magazine. Id. at 819).

Only one of the cases cited by Petitioners involved an armed suspect with a weapon other than a gun: *Berube v. Conley*, 506 F.3d 79 (1st Cir. 2007) (police use of force held reasonable against a suspect carrying and raising a hammer six or seven feet away in the dark), and another case cited by Petitioners for the same basic line of argument is *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), in which police shot the driver of a stolen minivan who was accelerating near the officers in a muddy area. In this case, no officer fell down near the vehicle (which did occur in Wilkinson just before the shots were fired, leading Officer Torres to believe the officer had been run over). The vehicle in this case drove away until the driver, who had been shot multiple tim s, crashed – a predictable result in line with *Vaughan v. Cox*, as cited by this Court in *Scott v. Harris*.

In summary then, the cases Petitioners cite (in support of the argument that virtually no amount of force is excessive once it becomes reasonable to use force) are mostly concerned with a different *form* of threat (a gun versus a car) and a different *degree* of threat. Despite the arguments of the Petitioners, cases do reflect a more common-sense understanding that the privilege to use force is not perpetual or unbounded in degree. It is measured by the degree of threat, which is influenced by the form of the threat.

III. PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY, AS THE DISTRICT JUDGE PROPERLY FOUND A VIOLATION OF CLEARLY ESTABLISHED LAW, AND THE DENIAL OF QUALIFIED IMMUNITY WAS APPROPRIATELY AFFIRMED BY THE SIXTH CIRCUIT; IN THE ALTERNATIVE, THIS COURT CAN REMAND FOR ADDITIONAL ANALYSIS AS TO WHETHER CLEARLY ESTABLISHED LAW WAS VIOLATED IF NECESSARY.

A. The Petitioners' belated arguments should be deemed waived.

The Petitioners argue to this Court that the Sixth Circuit erred by failing to analyze the "clearly established law" aspect of qualified immunity analysis. As a preliminary point, Ms. Rickard reiterates that this entire line of argument was not presented to the Sixth Circuit in either of the Petitioners' two separate petitions for rehearing to the Sixth Circuit and should be deemed waived. Respondent's Brief in Opposition to Writ of Certiorari, at 7-9, 30, and Appendix A and B thereto.

B. This Court can remand the issue of clearly established law, if necessary.

However, on a related note, as urged by the United States in its amicus curiae brief (e.g., at pages 11, 12, 17, 31 and 32), if this Court deems it significant that the words "clearly established" did not appear in the Sixth Circuit's opinion in this case as

an analytical shortcoming, it is obviously within this Court's power to remand this case to the Sixth Circuit to address the "clearly established" law prong of qualified immunity analysis. Doing so would, as the United States suggests, enable this Court to avoid deciding the constitutional question. Had the issue been raised in the Sixth Circuit instead of in this Court for the first time, the Sixth Circuit would have had the opportunity to address any such perceived analytical omission. However, Ms. Rickard respectfully submits that the constitutional violation and violation of clearly established law is clear in this case, for all of the reasons set forth herein.

C. The Petitioners violated clearly established law.

After *Tennessee v. Garner* in 1985, it was clearly established almost two decades before 2004 that it was constitutionally unreasonable to shoot an unarmed, nondangerous fleeing suspect dead in order to prevent his escape. It is significant that in *Garner* this Court also specifically rejected arguments that the Fourth Amendment "must be construed in light of the common-law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant." Adopting such an argument would be, as this Court stated in *Garner*, "a mistaken literalism that ignores the purposes of a historical inquiry," because the common-law rule arose at a time when virtually all felonies were punishable by death. 471 U.S. 1, 12-13. This Court in

Garner added that changes since the initial formulation of that rule had "undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life." Id. at 14. This Court also indicated that the common-law had developed at a time when weapons were rudimentary and deadly force could be inflicted almost solely in a hand-to-hand struggle, which necessarily put the safety of the arresting officer at risk, Id. at 14-15, and handguns did not become available to police until later in order to use deadly force from a distance as a means of apprehension. 471 U.S. 1, at 15.

The factual parallels between this case and *Garner* bring *Garner* clearly into play, not only for what was deemed (un)reasonable force, but also what was clearly established long before July of 2004. Because this is a shooting case, the district court (which the Court of Appeals affirmed) appropriately focused on *Garner*. As a shooting case, *Garner* fits the "specific context," *Saucier v. Katz*, 533 U.S. 194, 201, of this case. Like the suspect in *Garner*, the officers in this case shot the driver and the passenger of the car dead. They were unarmed, like the suspect in *Garner*, and it is true that they were fleeing, just as Garner tried to do, but they had been stopped only for a misdemeanor.

A chase occurred and the Rickard vehicle was cornered, "essentially stopped" as the Sixth Circuit noted, and then the first three police shots were fired.

Plumhoff, who fired those first three shots, was not in front of the vehicle. He was to the side of it and not threatened by it. The vehicle backed around the officers and began to drive away from them, whereupon the next 12 shots were fired. At that point, by the admission of Officer Forthman, the vehicle was not a threat to the officers behind the car (a point notably overlooked by Petitioners and their amici). A reasonable officer would have known that when Rickard was not moving, and then when he was heading *away* from the officers, it was not reasonable to use deadly force on him (or Ms. Allen).

Therefore, in this shooting of an unarmed driver and passenger who had originally been stopped for a misdemeanor and fled in a vehicle, based upon *Garner* it was clearly established well before July of 2004 that it was constitutionally unreasonable to shoot simply to prevent escape. However, because a chase in a vehicle preceded the shooting, Petitioners would have this Court hold that something with near pinpoint specificity was required in this case to establish clearly what would violate the Fourth Amendment.

D. This Court's own case law makes clear that there need not be a case (or cases) exactly on point to establish law "clearly" for qualified immunity purposes.

The requirement to show what has been clearly established has been articulated in various ways, but ultimately boils down to a "knowledge" requirement,

e.g., that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took" would violate constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Although it is realistically a fiction to believe police officers would spend time routinely reading qualified immunity decisions, by July of 2004, a reasonable officer would certainly have been expected to "know," in line with *Garner*, that it is constitutionally unreasonable to shoot an unarmed, nondangerous suspect dead. That is basic police training. Indeed, the officers' own written departmental policies support this point, paralleling *Garner* when a vehicle is involved. *See, e.g.*, JA 408, 411-12 (policy prohibiting the use of deadly force from or at any moving vehicle, except in a case where a violent felony has been committed in the officer's presence and the officer has determined that there is a much greater threat to innocent lives by not using deadly force, and urging officers to be extremely cautious in using deadly force in self-defense when the force used by the other person is an automobile and the other person is trying to get away. "The suspect's intentions are usually ambiguous, and the officer can usually escape harm at least as well by evading the vehicle" as by firing, particularly in a high speed chase).

The Petitioners and their amici stretch the analysis by emphasizing the most stringent sounding articulations of the test for clearly established law in isolation. For example, although it is true that this Court has used the words "beyond debate" to describe

clearly established law, and qualified immunity as protecting "all but the plainly incompetent or those who knowingly violate the law," it is also clear from this Court's cases that there is no requirement that there be a case exactly on point factually. This Court specifically said so in *Anderson v. Creighton*, 483 U.S. 635 (1987):

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful [internal case citation omitted]; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. 635, 640. Additionally, in the later case of *Brosseau v. Haugen*, 543 U.S. 194 (2004) this Court also indicated that "of course, in an obvious case, these standards [of *Graham* and *Garner*] can 'clearly establish' the answer, even without a relevant body of case law." *Brosseau*, *citing Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (noting in a case where the Eighth Amendment violation was "obvious" that there need not be a materially similar case for the right to be clearly established). In *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court rejected the notion that a government official's conduct had to be evaluated by cases that were "materially similar" or "fundamentally similar," noting that officials can still be on notice that their conduct violates established law "even in

novel factual circumstances," and the salient question is whether the law gave them "fair warning." 536 U.S. 730, 741.

Although Petitioners predictably rely on statements in later case law indicating that *Garner* and *Graham* are cast at a high level of generality, they fail to address the extent to which *Garner* fits the fact pattern in this case, including as to the issue of whether clearly established law was violated. In this regard, it is significant that Petitioners do argue (on the issue of whether the force was reasonable) that "*Garner* applies," and that they satisfy *Garner* [Petitioners' brief at 39], but their arguments are contingent upon the resolution of significant disputes, which arise because their own factual contentions are undermined by the video evidence and their own testimony. Their arguments are also undercut by the fact that many of the cases they rely on themselves analyze the issue with reference to *Garner*.

The net effect of the arguments of Petitioners (and amici, by extension), however, is a de facto requirement of a case exactly on point. The law is not so exacting, because this Court has already made that clear in *Anderson* and *Hope*, *supra*.

E. The officers who now claim they are immune from civil liability were themselves charged with the crime of reckless homicide for the incident at issue.

Additionally, it is again of significance that a grand jury in the State of Tennessee actually indicted Officers Plumhoff, Gardner and Galtelli for reckless homicide in the death of the passenger Kelly Allen.[3] This caused the case to be stayed. *See*, Relevant Documents in Western District of Tennessee No. 9 and 10, Motion to Stay and Supporting Memorandum, 10/13/05, No. 29, Order Staying Proceedings 5/10/06, and No. 32, Order Reopening Case 2/10/09. The Petitioners contend that their conduct in the shooting was objectively reasonable as a matter of law and could not have been found to violate clearly established law, but the State of Tennessee took the position that the officers acted recklessly.

F. The Court of Appeals appropriately affirmed the district court's denial of qualified immunity, which included a finding that clearly established law had been violated.

The Petitioners conclude that the Sixth Circuit's affirmance of the district court's denial of qualified

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[3] Along those lines, it is also noteworthy that the State of Tennessee is not one of the listed participants in the amicus curiae brief of the State of Ohio and 21 other states.

immunity necessarily conflated the first and second prongs of qualified immunity analysis because the Sixth Circuit did not directly mention clearly established law. Again, the Sixth Circuit was affirming the district court, which had directly addressed the issue. The Petitioners did not raise this issue to the Sixth Circuit when they sought rehearing.

As to the substance of the Petitioners' belated argument, what must be borne in mind is first how the case came procedurally to the Court of Appeals (as an interlocutory appeal of factual determinations foreclosed by *Johnson v. Jones*, *supra*) and second, what the Court of Appeals was affirming. The Court of Appeals was affirming a finding that the evidence, taken in the light most favorable to Ms. Rickard as nonmovant (including the video evidence), established a constitutional violation and a violation of clearly established law. This is what the Sixth Circuit affirmed, even if it did not use the words "clearly established" to specify the entirety of the scope of what it was affirming. Affirming the order of the district court denying summary judgment necessarily meant that it was affirming both "prongs" of qualified immunity analysis with the court below it having appropriately addressed both prongs. However, Petitioners assume the opposite necessarily occurred.

G. Factual disputes can and do determine not only whether a constitutional violation has occurred, but also a violation of clearly established law.

The findings of the district court which the Sixth Circuit affirmed included disputes about the degree of threat faced by the officers, which directly impacts the conclusion that clearly established law was violated. Given that it found a constitutional violation based upon the facts viewed in the light most favorable to Ms. Rickard, on the issue of whether clearly established law had been violated, the district court indicated that the relevant question was whether the officers' perceptions were reasonable in determining that Rickard posed a threat sufficient to justify deadly force. Pet. App. at 42. The district court proceeded to address *Brosseau v. Haugen*, as it had been cited by the Petitioners, noting that the Petitioners argued no court had found a Fourth Amendment violation where a police officer shot a fleeing suspect "who presented a risk to others." Pet. App. at 42. The district court noted that *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005), addressed "the opposite situation, where a fleeing suspect poses no immediate threat, and holds '[i]t is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head." Pet. App. at 42. Because the district court found that the facts in this case do not support a finding that a reasonable officer would have considered the fleeing suspects a clear risk to others, the district court found Mr. Rickard's

right to be free from excessive force clearly established and the officers not entitled to qualified immunity. Pet. App. at 42.

The analysis of the district court was appropriate because the claimed degree of threat was indeed a key issue. In reliance principally on *Saucier v. Katz*, 533 U.S. 194 (2001), Petitioners and their amici emphasize the separation of the issue of a violation of constitutional rights from the issue of whether the law at the time was clearly established. Without any disrespect to the points made by this Court in *Saucier*, the bright line between fact disputes and issues of law they advocate is not as ironclad and simple to apply in practical reality as Petitioners and their amici suggest. They would have this Court adopt a clear line between factual and legal questions in qualified immunity analysis as a one-size-fits all approach.

However, there is at least one problem with such a proposed bright line. Notwithstanding *Saucier*, disputed facts in excessive forces can and do influence not only whether there has been a constitutional violation, but also whether clearly established law has been violated, particularly where the degree of threat from the suspect determines the answer to one (or both) questions. The reason for that is ultimately fairly straightforward: generally, if the police are correct about the degree of threat posed by the suspect, their force is likely to be found reasonable, but if they are wrong and the plaintiffs are correct, the force is

likely to be found unreasonable and in violation of clearly established law, per *Garner*.

H. *Vaughan v. Cox* and *Lytle v. Bexar County*.

This is illustrated by cases such as *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), *reh'g den.* In *Vaughan*, the Eleventh Circuit found that the district court erred in granting an officer qualified immunity where the officer contended that he fired his gun during a pursuit because the suspect swerved as if to smash into his cruiser, indicating that a reasonable jury could find that the fleeing suspect did not present an immediate threat. The *Vaughan* court added that the officer was not foreclosed from asserting a qualified immunity defense at trial, however, because if the jury were to accept that the suspect had intentionally swerved toward the police cruiser, the jury could conclude that the officer had probable cause (under *Garner*) to believe the suspect had committed a crime involving the infliction or threatened infliction of serious physical harm. 343 F.3d 1323, 1333.

Lytle v. Bexar County, 560 F.3d 404 (5th Cir. 2009), *cert. den.*, 559 U.S. 1007, also shows that which view of the facts prevails can determine not only what was reasonable, but also a violation of clearly established law. The issue in *Lytle* was the distance and direction of a vehicle in which Heather Lytle was riding. She was killed from police gunfire after a brief chase. The parties disputed the distance

and direction of the vehicle, which bore directly on the issue of what degree of threat the vehicle presented to the officer.

On appeal, the Fifth Circuit noted that the two prongs of qualified immunity involve the complexity of two overlapping objective reasonableness inquiries, first addressing whether there was a constitutional violation, and then, if the court found the officer's conduct not reasonable under the Fourth Amendment, "we must ask the somewhat convoluted question of whether the law lacked such clarity that it would be reasonable for an officer to erroneously believe that his conduct was reasonable." 560 F.3d 404, 410.

The Fifth Circuit in *Lytle* noted that where the issue of whether the officer's conduct was reasonable is less clear, such a situation "mandates a number of factual inferences, [and] the case falls within the province of a jury." Id. at 411, noting that "we must remain mindful of the role the jury can play in this determination," and that this approach comports with the decision of the Supreme Court in *Scott v. Harris*.[4]

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[4] Along these lines, Petitioners and their amici insist that reasonableness is an issue of law for the court and not of fact for the jury, but it is important to note that this Court's opinion in *Scott v. Harris* indicated that reasonableness becomes an issue of law once the court has drawn inferences in favor of the nonmoving party "to the extent supportable by the record." 550 U.S. 372, 381 n.8. In this case, however, because the officers' own testimony and video evidence undermine their contentions,

(Continued on following page)

The *Lytle* Court indicated that the issue of distance and direction was "essential to determining whether the [car] posed a threat of harm at the time O'Donnell fired and the reasonableness of any response thereto." Id. at 412. The Fifth Circuit indicated that if the facts were as O'Donnell alleged, he would be entitled to qualified immunity because he was addressing a threat of immediate and severe harm. Id. at 412. However, if the facts were as Lytle alleged, the threat of harm "was potentially much different," and therefore distance and direction were relevant to the degree of threat O'Donnell would have faced when he fired. Id.

The Fifth Circuit agreed with the district court that distance and direction were essential to determining the extent of the threat the car actually posed. Id. at 413. The Fifth Circuit proceeded to cite a series of cases indicating that the justification to use force ceases as the threat ceases, Id. at 413, and indicated it had to assume that there was no threat to O'Donnell at the time of the shooting, with the lack of such a threat weighing against reasonableness. Id. at 414. In response to Officer O'Donnell's argument that *Scott v. Harris* authorized the use of force because there had been a chase, the Fifth Circuit disagreed, indicating that this Court's opinion in *Scott* "did not declare open season on suspects fleeing in motor vehicles." 560 F.3d 404, 414.

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the factual disputes should be questions for the jury and not the Court as a matter of law.

Having found O'Donnell could be determined to have acted unreasonably, the Fifth Circuit noted that O'Donnell had "fair warning" that his conduct would violate constitutional rights, Id. at 417, and it did not need to "dwell" on the issue:

> It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others [internal case citations omitted]. This holds as both a general matter, see *Garner*, 471 U.S. at 11-12, and in the more specific context of shooting a suspect fleeing in a motor vehicle [internal case citations omitted].
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> . . .
>
> We therefore hold that, were a jury to accept Lytle's version of the facts, it could conclude that O'Donnell had violated Heather Lytle's clearly established constitutional right to be free from an unreasonable seizure. Because Lytle's version of disputed facts permits a decision adverse to O'Donnell, the district court was correct to conclude that O'Donnell's entitlement to qualified immunity turns on the resolution of these factual issues.

Id. at 417-18.

Based upon not only *Lytle*, but also *Vaughan*, and *Smith v. Cupp*, *supra*, it was appropriate for the district court to have denied qualified immunity to

the officers, and the Sixth Circuit appropriately affirmed that denial of qualified immunity.

I. The Court of Appeals did not err in comparing the Petitioners' 2004 conduct to the facts of this Court's 2007 opinion in *Scott v. Harris*.

The Court of Appeals devoted a portion of its opinion to addressing (and ultimately distinguishing) this Court's opinion in *Scott v. Harris*. Petitioners contended to the courts below and now to this Court at page 23, footnote ten of their brief that *Scott* is "controlling," at least as to the issue of whether the force utilized in this case was reasonable. Therefore, the Sixth Circuit analyzed *Scott v. Harris* and distinguished it (properly, as even Petitioner's amicus the United States concedes that *Scott v. Harris* is not on all fours with the instant case).

The Petitioners now contend to this Court (without having raised it to the Sixth Circuit) that the Sixth Circuit erred by distinguishing *Scott v. Harris* on the issue of whether there was a violation of clearly established law (as out of proper time sequence), but that is not supported by any indication whatsoever on the part of the Sixth Circuit. That is the gloss the Petitioners and their amici have placed on the situation.

J. *Brosseau v. Haugen* does not illustrate that in 2004 it was not clearly established that the Petitioners could not fire 15 shots at a fleeing unarmed suspect.

The Petitioners contend this Court's opinion in *Brosseau v. Haugen* shows that it was not clearly established in July of 2004 that their use of force violated the Fourth Amendment. Respectfully, *Brosseau* is too significantly distinguishable on its facts to be conclusive in this case. The degree of force is the principal distinction, particularly in response to the disputed level of threat posed by Mr. Rickard. *Brosseau* involved one shot, which this Court found to be within the "hazy border" between acceptable and excessive force. By contrast, this case involved 15 shots at a vehicle containing an unarmed man and woman, and under the circumstances can and should be considered an "obvious" case per *Hope v. Pelzer*, *supra*.

In *Sample v. Bailey*, 409 F.3d 689 (6th Cir. 2005), the Sixth Circuit rejected the same type of argument based on *Brosseau* that Petitioners make now, calling for a high and specific degree of particularity. Applying *Garner*, the *Sample* Court indicated that when a general constitutional principle is not tied to particularized facts, it can clearly establish law applicable to different sets of detailed facts. Id. at 699. The Court found it to be clearly established since *Garner* that a criminal suspect has a right not to be shot unless he

is perceived to pose a threat to officers or others during flight. In this case, however, genuine issues of material fact about the degree of threat rendered qualified immunity inappropriate.

K. The district court, which the Sixth Circuit affirmed, appropriately analyzed precedent.

The district court in this case addressed a series of cases on the issue of what was clearly established, including cases from the Sixth Circuit. *See infra*, at II C.

Petitioners, for the first time in this case, now cite the unpublished case of *VanVorous v. Burmeister*, 96 Fed. Appx. 312, 2004 U.S. App. LEXIS 7920 (6th Cir. April 20, 2004) for the proposition that case law in the Sixth Circuit did not clearly establish that the Petitioners' actions were unconstitutional in July of 2004. *VanVorous* was not cited to the district court or the Sixth Circuit. At any rate, it is significantly distinguishable on its facts, which is important because those facts differentiate the degree of threat posed. The Petitioners indicate at page 29 of their brief to this Court that the Sixth Circuit found the actions of officers reasonable in firing on VanVorous because he was "actively using his vehicle as a weapon against police and dangerously attempting to escape and evade apprehension." The *VanVorous* opinion does not indicate whether video evidence

existed, but the facts as stated in the opinion indicate that it was uncontroverted that VanVorous crashed into a police car at approximately 14 miles per hour and then began pushing the vehicle back toward a ditch.

The video evidence in this case reveals key differences. First, any collisions occurring between Rickard and police vehicles (after Rickard was initially rear-ended) occurred while the vehicles were moving toward each other. Second, unlike *VanVorous*, the videos in this case show Rickard did not push Gardner's vehicle backward. Instead, it was Rickard who backed up and drove in the *opposite* direction trying to get away from the officers with gunfire continuing (at which point, as Officer Forthman testified, Rickard was not a threat to those behind him).

Smith v. Cupp, *supra*, is of particular significance. In finding gunfire against a suspect fleeing in a vehicle unreasonable (the arrestee had gained control of a police vehicle), the Sixth Circuit analyzed the issue under *Garner* (from 1985) and, distinguishing *Brosseau* on its facts, found *Garner* had clearly established that a non-dangerous fleeing felon could not be shot in the back of the head. 430 F.3d 766, 776. Although it was decided in 2005, *Smith v. Cupp* addressed conduct in 2002, which substantially predates the conduct in this case, and the right at issue was found to be clearly established as "an obvious case" because the general rule applied with

"obvious clarity." Id. at 777. The same is true of *Sigley v. City of Parma Heights*, 437 F.3d 527 (6th Cir. 2006), decided in 2006 but also analyzing under *Garner* and addressing conduct which occurred in 2002, and noting that the clearly established law should not be framed "by resolving all of the disputed facts against the Plaintiffs." Id. at 537.

Respectfully, the cases, viewed together in summary form, reveal that courts in both the Sixth Circuit and the Eighth Circuit (1) have historically analyzed excessive force claims with reference to *Garner*, (2) and disputes (or the lack thereof) about the degree of threat posed by the suspects have often determined whether qualified immunity is proper. Again, this is because whether a violation of clearly established law has occurred can turn on whether the jury accepts the version of the police or the plaintiff on the degree of threat posed to police. *See, e.g., Scott v. Clay County, Tenn.*, 205 F.3d 867 (6th Cir. 2000) (in a case involving a chase followed by a shooting, analyzing qualified immunity under *Graham* and *Garner*, shooting officer's actions held objectively reasonable when suspect turned and drove vehicle directly toward another officer before he fired. Id. at 872, 879); *VanVorous v. Burmeister*, 96 Fed. Appx. 312, 2004 U.S. App. LEXIS 7920 (6th Cir. April 20, 2004) (analyzing the issue of threat the suspect posed under *Garner*, actions of officers found reasonable in firing on a suspect who crashed into a police car at approximately 14 miles per hour and then began

pushing the police vehicle back toward a ditch); *Sigley v. City of Parma Heights*, 437 F.3d 527 (6th Cir. 2006) (analyzing under *Garner*, factual dispute as to reasonableness of officers' actions and whether suspect posed danger to officers and others precluded qualified immunity, because, viewing the facts in the light most favorable to the Plaintiff, Mockler (who shot Davis) was running behind Davis's car and out of danger and Davis drove in a manner to avoid others on the scene in an attempt to flee; accepting these facts as true, Mockler "would have fair notice" that shooting Davis in the back was unlawful when he did not pose an immediate threat to other officers); *Smith v. Cupp*, 430 F.3d 766, 770 (6th Cir. 2005) (analyzing under *Garner*, qualified immunity denied to officer who shot fleeing suspect, when officer asserted he fired because the suspect's vehicle "rapidly accelerated directly at [him] and [another officer]; officer conceded after the fact that he had fired while the car was passing him, and Court found that even viewing the events in the heat of the moment, without 20/20 hindsight, a jury could conclude that a reasonable officer in the officer's position was never in any danger. Id. at 774); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (finding that deadly force was not unreasonable as a matter of law where suspect had attempted to ram a cruiser, was cornered, sped forward, and crashed into a police cruiser that was

blocking his escape, and was speeding up a street toward a roadblock manned by other officers).

The cases therefore collectively illustrate the basic principle that the degree of threat helps dictate the analysis, with *Garner* as the established foundation.

L. Eighth Circuit precedent.

The Petitioners present a territorial argument that Eighth Circuit law did not clearly establish that their actions were unconstitutional. Although the chase began in Arkansas, the deadly force was used in Tennessee. Therefore, the district court applied Sixth Circuit law.

However, like the cases in the Sixth Circuit, the Eighth Circuit police chase cases discussed have also involved analysis based upon *Garner*, and the qualified immunity analysis has turned on the degree of threat posed to police at the time force was used, with qualified immunity being denied when the degree of threat was disputed. If Petitioners' own position is to be credited that Eighth Circuit precedent applies, perhaps the best example is *McCaslin v. Wilkins*, 183 F.3d 775, 779 (8th Cir. 1999), cited by the United States as amicus in support of Petitioners (analyzing the Fourth Amendment issue under *Garner*, and holding qualified immunity properly denied as to officer who fired on vehicle after a chase because genuine issues of material fact existed "as to whether

McCaslin posed a threat to officers or others after he went off the road and whether force was necessary to prevent his escape"). *See, also, Hernandez v. Jarman*, 340 F.3d 617 (8th Cir. 2003) (analyzing under *Garner*, and holding force objectively reasonable when, during chase, suspect turned and drove toward officers and officer fired four shots, killing suspect who was found to have intentionally caused collision. Id. at 622); and *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993) (analyzing under *Garner* and *Graham*, and holding force objectively reasonable where suspect, after approximately 50 mile high speed chase, sped past a roadblock).

Like *Vaughan v. Cox* in the Eleventh Circuit, *Lytle v. Bexar County* in the Fifth Circuit, and *Smith v. Cupp* in the Sixth Circuit, *McCaslin v. Wilkins* in the Eighth Circuit helps illustrate that qualified immunity can and should be denied where genuine issues of material fact exist as to whether a suspect posed a sufficient threat to officers at the time force was used. Such issues clearly exist in this case and qualified immunity was therefore properly denied.

CONCLUSION

The courts below appropriately denied qualified immunity to the Petitioners in this case. This Court should affirm the Court of Appeals; however, in the alternative, in the event this Court believes the Court

of Appeals should have provided specific analysis as to the issue of whether the Petitioners violated clearly established law, this Court can remand this case to the Sixth Circuit without deciding whether the officers' conduct was objectively reasonable as a matter of law under the Fourth Amendment.

Respectfully submitted,

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REPLY BRIEF

RECORD
AND
BRIEFS

No. 12-1117

Supreme Court, U.S.
FILED
FEB 20 2014
OFFICE OF THE CLERK

In The

Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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ARGUMENT

I. Appellate jurisdiction exists because this appeal presents legal questions.

Respondent contends that appellate jurisdiction did not exist here under 28 U.S.C. § 1291. Respondent misreads *Johnson v. Jones*, 515 U.S. 304 (1995). In *Johnson*, this Court found appellate jurisdiction lacking over an order denying immunity, where the district court order "determine[d] only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, prove at trial." *Id.* at 313. *Johnson* did not involve *any* question about what the law was or whether the law was clearly established. *Johnson* only involved the question whether the evidence was sufficient to establish that three of the officers being sued were present at the time plaintiff's rights were allegedly violated. *Id.* at 308. Therefore, as amici State of Ohio *et al.* explain here, *Johnson* stands for the proposition that jurisdiction is lacking where an appeal presents merely a question of evidentiary sufficiency. *Johnson* does not, however, dictate a lack of jurisdiction when a qualified immunity appeal presents a question of whether clearly established law was violated, nor does *Johnson* limit the scope of review in such cases.

Assuming *arguendo* that this appeal involved a question of evidentiary sufficiency, it would not involve *merely* a question of evidentiary sufficiency, like *Johnson*. Here, petitioners appealed a denial of qualified immunity, contending that their conduct was

reasonable under the Fourth Amendment and that it did not violate clearly established law. The presence of those legal questions in this appeal differentiates this appeal from *Johnson*. Jurisdiction exists.

Even under respondents' incorrect interpretation of *Johnson*, that case would be inapposite because here, unlike in *Johnson,* there is no real question of evidentiary sufficiency. As in *Scott v. Harris*, 550 U.S. 372 (2007), here there is no genuine dispute about *the facts*. The historical facts come exclusively from the video evidence and the testimony of petitioners. Respondent simply argues with petitioners' characterizations of *some* of the undisputed events in this case. Respondent is disregarding the essential facts and focusing on nonessential (immaterial) ones, to construct a story that a rampaging driver was not dangerous – a story that just does not hold up in light of the record as a whole. Courts have jurisdiction to reject fiction. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* at 378.

The disputes here are legal in nature, and therefore the Court has jurisdiction. As in *Scott*, the record here is essentially undisputed. But, the parties dispute the relative significance of those facts in the determination of Fourth Amendment reasonableness and qualified immunity. These questions are legal, not factual. Disputes about Fourth Amendment

reasonableness are legal disputes. *Scott*, 550 U.S. at 382 & n.8; *see also* Amicus Brief of the National Conference of State Legislatures *et al.* (SLLC Brief) 12-19. Disputes about immunity are likewise legal. *Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991) (per curiam); *see also* SLLC Br. 19-27.

Appellate jurisdiction exists here.

II. There are no genuine disputes about the facts here, just legal disputes about Fourth Amendment reasonableness and the state of clearly established law in 2004.

Respondent claims that factual disputes exist here. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). Respondent here alleges disputes that are neither genuine, nor material, nor even factual.

The disputes here pertain to what the undisputed facts mean for purposes of the legal issues: Fourth Amendment reasonableness and qualified immunity. As in *Scott*, the disputes in this case are in the nature of "on the one hand X, on the other hand, Y," where X is a fact that would seem to support the reasonableness of force and Y is a fact that would seem to counsel against it – but X and Y are not facts that actually conflict with each other.

For example, it is undisputed that Rickard swerved toward police vehicles at high speeds on I-40 (fact X), and it is also undisputed that he did not actually make contact with police vehicles on I-40 (fact Y), a fact on which respondent relies in alleging a factual dispute. Resp. Br. 9. The "conflict" between fact X and fact Y is not about which one happened, because they both happened. Rather, the "conflict" consists of determining the relative weights of fact X *and* fact Y – *and* all of the other facts in the case – in deciding the ultimate reasonableness of deadly force under the Fourth Amendment, and the qualified immunity question. These are the types of "conflicts" that the lower courts identified. Pet. App. 1, 16; *see also* Resp. Br. 27-30, 46-48 (describing lower court decisions). These are disputes about the ultimate legal significance of the undisputed facts.

With regard to the chase on I-40 and through the streets of Memphis, respondent's claim of a "factual" dispute is premised on the Court ignoring the essential undisputed facts: Rickard fled a lawful traffic stop and drove at high speeds on the interstate, weaving dangerously in and out of traffic.[1] Rickard

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[1] Contrary to Amicus National Association of Criminal Defense Lawyers' ("NACDL") contention that the speed of the chase did not exceed 75 miles per hour, Plumhoff testified that while on the interstate he viewed his speedometer at one time and it read 103 or 104 miles per hour. J.A. 353. Furthermore, the videos of the incident clearly show Rickard driving significantly faster than other traffic on the interstate as he passes many vehicles heading to Memphis.

swerved at Plumhoff's patrol car, forcing him onto the right shoulder of the interstate, and then Rickard swerved all the way back across the three-lane freeway toward Jimmy Evans' patrol car. Video of Unit 279 at 11:11:31-42. The officers testified to the same and they broadcast it as it happened on their police radios, and the video indisputably shows it.[1] Then Rickard dangerously exited I-40 into Memphis, where Rickard cut off a truck pulling a trailer and nearly caused a collision. J.A. 178; Video of Unit 279 at 11:13:22. Rickard continued to flee police on surface streets. Rather than confront these undisputed facts, respondent protests that no contact was made on I-40 (something no one disputes) and quibbles that without any contact no "aggravated assaults" occurred (a legal argument that is beside the point and which also confuses assault with battery). Resp. Br. 9-12. The question here is not whether contact was made, or what specific crime may have occurred. Rather, the question is whether it was reasonable, even if

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[1] Respondent's complaints about the lack of resolution and glare on the video, Resp. Br. 9-12, can hardly create a factual dispute. Respondent complains that the video is of no help in determining exactly how close Rickard came to the police vehicles on I-40. The lower courts observed as much, noting that the video did not provide "clear support for either the plaintiff's or the defendants' version of what occurred." Pet. App. 10. But a video with resolution so poor that cannot shed light on the details one way or the other does not create a factual dispute. Here, the video does indisputably shows Rickard's vehicle moving toward police vehicles. It in no way conflicts with the officers' sworn testimony or their contemporaneous radio broadcasts about the aggravated assaults.

mistaken, for the officers to believe Rickard was driving dangerously and trying to veer toward their patrol cars.

Respondent likewise glosses over the essential undisputed facts about the events in the parking lot leading up to shots being fired. In the parking lot, Rickard first collided with Vance Plumhoff's patrol cruiser, and then he was partially blocked in. Video of Unit 286 at 12:17:44. With Plumhoff and other officers approaching on foot to arrest Rickard, Rickard accelerated and the front of the Honda struck[3] Officer Gardner's car three times. The front tires of the Honda, with front wheel drive, were spinning, pushing against the patrol car, and Gardner's car was rocking back and forth, even while Gardner was exiting his car and clearly not accelerating himself. Video of Unit 286 at 12:17:42-46. Plumhoff was on foot next to the right front wheel of the Honda, ordering Rickard to stop. In an instant, Rickard could have run over Plumhoff by turning his steering wheel hard to the left and putting his vehicle in reverse. *Id.* Other officers were on foot as well. Respondent protests that the officers could not know Rickard's subjective intent at this point in time. Resp. Br. at 12-17. However, that is irrelevant. No officer can know the subjective intent of a resisting arrestee. That is

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[3] However the contact between Rickard's car and Gardner's cruiser is characterized – a ram, a strike, or simply contact – it indisputably occurred with officers in close proximity on foot, and it indisputably occurred *before* any shots were fired.

precisely why the Fourth Amendment test is an objective one, subject to de novo review,[4] that asks what conclusions a reasonable officer is permitted to draw from the objective facts developing before him. Here, the officers had observed Rickard's complete disregard for the public and officers. Now in the parking lot, all objective signs indicated that Rickard was attempting to escape at all costs with similar disregard for the safety of officers in vehicles and nearby officers on foot. He had collided with two police vehicles, and all objective indications were that the latter collision at least was intentional. A dispute about what a reasonable officer could conclude from these objective facts is not a factual dispute: It is a legal one.

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[4] *Elder v. Holloway*, 510 U.S. 510, 516 (1994):

> Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law, not one of "legal facts." *See Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985); *Harlow v. Fitzgerald*, 457 U.S. at 818. That question of law, like the generality of such questions, must be resolved de novo on appeal. *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 558 (1988). A court engaging in review of a qualified immunity judgment should therefore use its "full knowledge of its own [and other relevant] precedents." *See Davis*, 468 U.S. at 192, n.9.

See also Ornelas v. United States, 517 U.S. 690 (1996) (Fourth Amendment's probable cause and reasonable suspicion determinations subject to de novo review as questions of law based on historical facts).

Respondent also claims factual disputes about what happened during the ten seconds when all fifteen shots were fired. However, respondent never disputes the most significant undisputed fact about what happened: During the ten-second span of time when all three officers fired all of their shots, Rickard was never subdued and continued his dangerous flight.

Plumhoff testified that right before he fired the first shots, he felt it was "up in the air" as to what Rickard would do next. J.A. 364. While Plumhoff's subjective views are not controlling for Fourth Amendment purposes, this was a reasonable concern for a reasonable officer to have, given Rickard's course of conduct. Three seconds after the first contact was made between the Honda at Gardner's patrol unit, Plumhoff fired the first of three shots. Video of Unit 286 at 12:17:45-47.

While officers were still on foot in close proximity to the Honda, Rickard suddenly backed up. Officer Lance Ellis was in Rickard's path and had to move out of the way. Respondent does not contest this, but argues there is a factual dispute because "Officer Ellis needed only one step away from the path of the vehicle." Resp. Br. 19-20. But whether or not Officer Ellis' step was "dramatic," as respondent puts it, *id.* at 19, is not material for Fourth Amendment purposes. What *is* material is that Rickard tried to run over a police officer. From that fact – and everything Rickard had done up to that point – an objectively reasonable police officer could conclude that Rickard

would continue to pose a threat of death or serious injury so long as he was at large. Officers Gardner and Galtelli fired ten rounds and two rounds respectively. Some of the rounds were fired as Rickard finished backing up toward Lance Ellis, and the officers continued to fire as Rickard put his vehicle in drive and moved forward toward Jackson Avenue. Respondent here urges that a factual dispute exists, because once Rickard started to move forward officers were not in his path and he was not about to run over the officers behind him, a fact that Officer Forthman confirmed. Resp. Br. 20-21. But respondent's emphasis on this fact in no way creates a *factual* dispute. This is simply another fact to take into account in the legal Fourth Amendment reasonableness analysis and the immunity analysis. And as discussed below, it is ultimately a fact that does not carry the day for respondent against Officers Gardner and Galtelli. To the contrary, both *Scott* and *Brosseau v. Haugen*, 543 U.S. 194 (2004), confirm that when a suspect has engaged in a course of conduct evidencing disregard for the safety of the driving public and officers on foot, the fact that he is not about to run over or collide with someone *at the very moment* officers use force does not make the force unreasonable, let alone clearly unreasonable, under the Fourth Amendment.

Finally, respondent protests that there are issues of fact because Rickard was "unarmed" and the initial reason Rickard was stopped was for a broken headlight. Resp. Br. 21-22, 36-38, 40-42. But petitioners have never contended that Rickard used a gun, nor do

they dispute that the initial traffic stop was for a minor offense. These are not factual disputes, they are simply more undisputed but immaterial facts. And in *Scott*, this Court decided that facts like this don't matter when it comes to a recklessly fleeing motorist. It is the rampage *after* the initial offense that justifies force, and Rickard used his vehicle as a deadly weapon. *Scott*, 550 U.S. at 382 n.9, 383; *see also Sykes v. United* States, 131 S. Ct. 2267, 2273-74 (2011).

III. Qualified immunity applies here because it was not clearly established that deadly force was prohibited in this situation.

Based on the undisputed facts here, the Court can answer the legal question: whether every reasonable officer would know that using deadly force to stop Rickard would violate Rickard's constitutional rights such that only a plainly incompetent officer could conclude deadly force was constitutionally permitted. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).[5] It remains a legal question whether immunity

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[5] Respondent's waiver argument is not well taken. Resp. Br. 39. Respondent contends that petitioners waived some qualified immunity *arguments* by not repeating them in a petitioning for rehearing to the court of appeals. There has never been such a rule, and there hardly could be, given that it is *optional* to petition the court of appeals for rehearing *at all* before filing a petition for certiorari to this Court. *E.g.*, Supreme Court Rule 13(3) (extending time to file petition for certiorari "*if* a petition for rehearing is timely filed") (emphasis added). Respondent of course

(Continued on following page)

applies, and that standard gives substantial leeway to the perceptions and judgments of officers on the scene. *See* SLLC Brief 19-27. Qualified immunity gives "breathing room" to officers to make mistakes, so long as they are not mistakes so egregious that only a "plainly incompetent" officer could make them. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (per curiam).

Respondent concedes that reasonable minds could differ as to whether force was reasonable here. Resp. Br. 25 ("At a minimum, reasonable minds could differ on the issue of the Petitioners' objective reasonableness, and the courts below did not err in this regard."). This, petitioners submit, should be determinative of this case: That is precisely the situation where qualified immunity protects officers' judgments, regardless whether those judgments are about

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cannot make a proper waiver argument here. Respondent cannot contend that the qualified immunity *issue* was not argued in the court of appeals or for that matter the district court. *Memorandum of Law in Support of Motion for Summary Judgment*, United States District Court, Eastern Dist. of Tennessee, Case No. 2489, Doc. No. 54-1, pp. 20-25; *Appellants' Brief*, United States Court of Appeals for the Sixth Circuit, Case No. 11-5266, pp. 15-24; *see also* Tr. Oral Argument (July 18, 2012). This Court has never imposed a requirement that particular *arguments* must be made below or otherwise waived. To the contrary, the Court requires that the *issue* (qualified immunity) be raised below, and the "traditional rule" is that "new arguments" in support of properly raised issues are permitted. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Any other rule would improperly constrain this Court's ability to correctly state the law.

the law *or* the facts *or* both. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

A. The law did not clearly establish that deadly force was prohibited here.

In July of 2004 it was not clearly established that Petitioners could not use deadly force to stop Rickard from continuing to flee and endanger the officers and the innocent public. This conclusion follows from *Brosseau v. Haugen*, decided later in 2004, where the Court held it was not clearly in violation of the Fourth Amendment "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." 543 U.S. at 200. Rickard's flight in this case was demonstrably more dangerous than the flight described in *Brosseau*. Officers could at least arguably conclude deadly force was authorized; it was not beyond debate in July of 2004 that such force, as it was employed in this case, was unconstitutional.

Respondent and amici would have the Court conclude that if Rickard was not about to run someone over at that very moment, the law was clearly established that petitioners were prohibited from using deadly force. But this Court has never held that a precondition for the use of deadly force is that an officer must actually put his life – or the life of an innocent citizen – on the line. "Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."

Terry v. Ohio, 392 U.S. 1, 23 (1968). And such a rule would run contrary to *Brosseau* and *Scott*. In *Scott*, this Court found it reasonable for Deputy Scott to seize Harris when he did, even though Harris was not threatening other motorists or pedestrians at that moment. 550 U.S. at 380 n.7. Under this Court's decisions, a reasonable officer is permitted and even expected to take into account the risk that a suspect will pose in five, ten, thirty, or sixty seconds, or even several minutes later if he is not immediately seized. *Id.* at 384-85 ("it is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase. . . ." "Couldn't the innocent public equally have been protected, and the tragic accident entirely avoided, if the police had simply ceased their pursuit? We think the police need not have taken that chance and hoped for the best.") In *Brosseau*, the officer was held immune after shooting a suspect who was fleeing in a vehicle, on the basis that the suspect *might* endanger others as he drove away from the officer. 543 U.S. at 200.

Here, after Rickard's dangerous actions prior to and during the use of force, reasonable officers could conclude he remained a threat of serious physical injury or death to anyone in his path and they were constitutionally permitted to end that threat. This is what the law at the time suggests, and neither respondent nor their amici have cited clearly established law to the contrary as of July 2004. Considering

Brosseau, every reasonable officer would not conclude that the Petitioners acted unconstitutionally in ending the threats posed by Rickard via the use of deadly force.

In the Sixth Circuit (and the Eighth Circuit) as of the date of this use of force, the Petitioners could not have known that shooting Rickard would violate his Fourth Amendment rights. Indeed, two significant points were made by the Sixth Circuit in *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992). The Sixth Circuit dispelled the notion that a surrounded suspect no longer presents a danger of serious physical injury or death to officers and most notably, held the use of deadly force to be objectively reasonable where the suspect would do almost anything to avoid capture. Importantly, the Sixth Circuit held that officers could assume that such a suspect would not stop at threatening others unless stopped by police. *Id.* These determinations are applicable to this case and, considering Rickard's dangerous behavior throughout the pursuit and the fact that the use of force occurred in a matter of ten seconds while the situation remained tense and rapidly evolving, Petitioners did not violate clearly established law in 2004 or even now. The use of force under the Fourth Amendment is viewed through the perspective of officers on the scene, not in the quiet of the courtroom; and, the Court has held recently that officers' on-the-scene determination that a suspect presents a danger is entitled to deference precisely because not affording such deference would lead to reviewing officers'

on-the-scene determinations and actions with 20/20 hindsight. *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012); *see also* SLLC Brief at 24-27.

Respondent is wrong to claim, Resp. Br. 42-45, that petitioners are contending that immunity applies for any use of force absent an on-point case. Petitioners agree that there is no immunity in cases where deadly force was "obviously egregious." *Becker v. Bateman*, 709 F.3d 1019, 1025 (10th Cir. 2013). But this case is not one of them.

Indeed, respondent's efforts to identify clearly established law fall short of the mark. Respondent argues that *Garner* clearly established that petitioners could not use deadly force here. Resp. Br. 40-42. But that argument falls apart even under respondent's characterization of *Garner*. Respondents rely on *Garner* having established "that it was constitutionally unreasonable to shoot an unarmed, non-dangerous fleeing suspect dead in order to prevent his escape." *Id.* at 40. But just as *Garner* did not set a constitutional prohibition on the use of force in *Scott* – let alone "clearly establish" a prohibition – it does not do so here. Here, Rickard's deadly weapon was a vehicle which he was wielding at officers and the innocent public, Rickard was not non-dangerous, and the officers fired at Rickard to stop him from menacing officers and the public with his vehicle, not merely to prevent his escape, as in *Garner*. *Tennessee v. Garner*, 471 U.S. 1, 21 (1985) (the officer "never attempted to justify his actions on any basis other than the need to prevent an escape").

The cases cited by Respondent, with one exception, were all decided *after* 2004 and, thus, could not support any clearly established legal principle in 2004. The one case remaining is from the Eleventh Circuit, *Vaughn v. Cox*, 343 F.3d 1323 (11th Cir. 2003), and that case is inapposite. There, there were in fact witnesses who disputed the deputy's version of events, whereas in this case there are no such witnesses. *Id.* at 1327. Further, there was no evidence in that case that the suspect vehicle struck two police cruisers head on. Finally, one case from another jurisdiction does not represent a robust consensus of persuasive authority, particularly where it is readily distinguishable. Respondent has failed in the courts below and in this Court to show clearly established law *at the time* of the events in this case prohibited Petitioners' conduct.

Further, while there was a passenger in Rickard's car, the presence of Ms. Allen did not make Rickard less dangerous and less of a threat of serious injury. Furthermore, just as in *Scott*, telling officers that they cannot pursue or use deadly force against a dangerous fleeing felon creates the perverse incentive for dangerous felons fleeing from police to take a hostage or pre-arrange an ostensibly innocent passenger. The Court should not rule as a categorical matter that the existence of a passenger eliminates the justification for the use of force to stop the threat posed by a dangerous driver. At the very least, officers in petitioners' place would not have been given fair warning in 2004 that the use of force to stop a dangerous

driver such as Rickard would violate Rickard's constitutional right because he also had a passenger in the car. It defies any sense of reason or justice to permit Rickard to willfully put his passenger in danger, and then allow Rickard to invoke *her* safety as a reason why officers cannot use force against *him*. Rickard has no moral or legal standing to assert Ms. Allen's rights here.

B. Given the facts here, it cannot be said that only a plainly incompetent officer could conclude that Rickard posed a threat serious enough to warrant the use of deadly force.

Respondent and their amici contend that where competing arguments could be made about the degree of threat posed by a suspect, a jury must decide. Resp. Br. 48-49. Indeed, respondent even states that a jury should decide the Fourth Amendment issue here because "[a]t a minimum, reasonable minds could differ on the issue of the Petitioners' objective reasonableness." *Id.* at 25. Qualified immunity, however, protects officers precisely when reasonable minds could differ, regardless whether the contested issue is a legal, factual, or mixed issue of fact and law. *Pearson*, 555 U.S. at 231. Thus – even assuming respondent's incorrect view that it is a factual issue whether force was reasonable, or whether an officer could conclude that a given degree of threat existed based on the facts before him – qualified immunity would still apply in light of respondent's concession.

There is no way to look at the facts here and conclude that only a plainly incompetent officer could have reached the conclusion that Rickard would pose a threat of serious injury or death if allowed to continue his spree. Could only a plainly incompetent officer conclude, from Rickard's high-speed flight on I-40 and through the streets of Memphis, that Rickard would pose a threat of death or serious injury to innocent motorists if the chase continued? Could only a plainly incompetent officer conclude, from Rickard's running into an occupied police car with his wheels spinning, with officers on foot next to him, that Rickard posed a threat of death or serious injury to police officers? Could only a plainly incompetent officer conclude, from Rickard's sudden attempt to back up and nearly run over a different police officer on foot, that Rickard still posed a threat of death or serious injury to police officers and would stop at nothing to escape? If the answer to any of these questions is "no" – and that is the answer to all of these questions – the petitioners retain immunity.

Thus, at the very least, the officers are entitled to qualified immunity under the second prong of the qualified immunity analysis.

IV. Petitioners' use of force was constitutional.

Respondent suggests, Resp. Br. 30-35, that petitioners are advocating a rule that permits police to shoot anyone that flees in a motor vehicle. On the contrary, petitioners propose the following: It is not

unreasonable for police to use deadly force to stop someone who flees a traffic stop in an automobile in a manner that creates a risk of serious physical injury or death to innocent motorists and then continues to pose the same risk during a close-quarters encounter with police officers on foot. Such a rule represents only a minor extension of *Scott v. Harris* and would permit the use of deadly force only where, as in this case, someone flees in an automobile in a manner that is dangerous and risks serious harm to others. Such an extension is warranted; in reality, when used in various ways, an automobile is a deadly weapon just as lethal as a gun. *See Scott*, 550 U.S. at 383; *Sykes*, 131 S. Ct. at 2273-74. Furthermore, in this case, at the time of the shooting, officers had already attempted to use their patrol cars to stop Rickard to no avail. Thus, they were left with only one alternative in stopping the threat posed by Rickard: the use of firearms.

Rickard fled a lawful traffic stop immediately after being asked about alcohol in his car and being asked twice to exit his vehicle. On the interstate, he drove a high speeds, swerved in and out of traffic, and moved his car towards officers' patrol cars. At that point, he was not simply a misdemeanant; rather, he was committing felony fleeing, a dangerous crime. On the interstate, dispatch noted that the license plate on the Honda was registered to a different car. Video of Unit 279 at 11:11:56. This gave Petitioners

probable cause of grand theft auto, another felony.[6] Rickard swerved in front of a civilian driver pulling a boat trailer, clearly endangering that individual who had to slam on his brakes to avoid hitting Rickard. An officer on the scene could conclude that act endangered the civilian driver. Then, after ostensibly cornered in a parking lot, Rickard used the Honda aggressively and defiantly and demonstrated he would continue to use the car to continue to escape at any cost, while officers were out of their cars on foot trying to stop him. Then, officers used force to protect themselves and to prevent Rickard from continuing his threatening and dangerous behavior. These events are shown on the videos submitted to the Court and any attempt to dispute them – albeit with no evidence – by Respondent is unavailing.

Under *Graham v. Connor*, 490 U.S. 386 (1989), the Court must determine the objective reasonableness of force, considered from the perspective of the officer. Respondent's amicus NACDL cites *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), in an attempt to argue that summary judgment can never be granted in a case involving deadly force based on officers' testimony. But that case does not apply here. The *Reeves* case is an employment case regarding the standard under Federal Rule of Civil Procedure 50. Moreover, the contested issue in

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[6] By the time deadly force was employed, probable cause existed that Mr. Rickard had committed felony fleeing, grand theft auto, multiple aggravated assaults, and resisting arrest.

Reeves was subjective intent, and the circumstantial evidence tended to show discriminatory intent. Of course under those circumstances the defendant's testimony about subjective intent could not be dispositive. But subjective intent is irrelevant in a Fourth Amendment case like this one, where the issue is whether conduct was objectively reasonable under the Fourth Amendment, measured from the standpoint of an objectively reasonable officer in the same position. Intent is likewise irrelevant to whether qualified immunity applies. And in any case, the officers' testimony in this case was in fact supported by a disinterested witness – James Pearce, Vance Plumhoff's civilian ride-along. (J.A. 113-116). That witness gave a statement to Memphis Police on the night of the incident in question which corroborates the Officers' testimony and further demonstrates the dangers posed by Mr. Rickard prior to the use of deadly force. Additionally, both the video and the contemporaneous police radio recordings corroborate the Petitioners' testimony below.

Further, the courts of appeals that have considered *Reeves* have not applied it as broadly as NACDL suggests it should be applied. In *Wilcox v. State Farm Mut. Auto. Ins. Co.*, 253 F.3d 1069 (8th Cir. 2001), the Eighth Circuit Court of Appeals noted that it was "uncertain" if that was a proper case to credit an interested party's testimony, but noted that *Reeves* was not so broad to always preclude consideration of an interested party's testimony. 253 F.3d at 1070-71. The United States Court of Appeals for the

Sixth Circuit has twice decided that the issue is whether the interested party is unimpeached and uncontradicted and, if so, that party's testimony may be considered. *Stratienko v. Cordis Corp.*, 429 F.3d 592 (6th Cir. 2005) (citing previous unpublished opinion).

Finally, both the respondent and amici have noted that three of the officers were indicted for the shooting of *the passenger*. Those charges were dismissed and they were not found guilty of anything. A local prosecutor's unilateral decision to bring charges is not evidence of anything, and in any case the charges were expunged, following a court order to the local prosecutor to allow pretrial diversion. Resp. Br. 25. Surely, the principle that defendants in this Nation are innocent until proven guilty has not escaped respondent. Further, the prosecution arose from the death of the passenger, not Mr. Rickard. It is offensive to any sense of justice for Mr. Rickard to assert the rights of the passenger whom he willfully put in danger.

The merits must be judged from the perspective of officers on the scene and, despite respondent's attempt to have the Court view the case via 20/20 hindsight, the officers' actions were not unreasonable as a matter of law. Thus, the Court should reverse the court of appeals on the merits of the Fourth Amendment issue in this case.

V. The Court should not remand the determination of qualified immunity back to the Sixth Circuit Court of Appeals.

Despite various suggestions from respondent and amici, the Court should not remand the case back to the Sixth Circuit for a determination whether the law was clearly established as of 2004. For two reasons, this Court should decide the petitioners' entitlement to immunity under de novo review.

First, the lower courts need guidance about how to apply the qualified immunity standard in a Fourth Amendment force case like this one. This Court's recent decisions have underscored the significant protection that qualified immunity provides government officials. Lower courts nevertheless continue to make mistakes when it comes to how immunity applies in force cases. It has been nearly ten years since this Court decided *Brosseau v. Haugen* and illustrated to lower courts how immunity applies to a Fourth Amendment force case. It will be far more helpful to the lower courts for this Court to provide not just an abstract statement of the qualified immunity legal standard, but also to show the lower courts how to apply it to a case like this one.

Second, qualified immunity is immunity from suit, a right not to be burdened with litigation. As this Court has held, the question of immunity should be answered at the earliest stage in a given case. Indeed, the Ninth Circuit made the identical mistake in *Saucier v. Katz*, 533 U.S. 194 (2001), as the Sixth

Circuit has in this case, yet this Court determined the immunity question itself and did not remand to the Ninth Circuit for that court to decide the qualified immunity question. *Id.* at 209. This case has been pending since 2005 and the immunity question should be determined by this Court, not made subject to further burdensome litigation.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN - 6 2014
OFFICE OF THE CLERK

No. 12-1117

In the Supreme Court of the United States

OFFICER VANCE PLUMHOFF, ET AL., PETITIONERS

v.

WHITNE RICKARD, A MINOR CHILD, INDIVIDUALLY, AND AS SURVIVING DAUGHTER OF DONALD RICKARD, DECEASED, BY AND THROUGH HER MOTHER SAMANTHA RICKARD, AS PARENT AND NEXT FRIEND

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether the court of appeals failed to conduct a proper qualified-immunity analysis.

2. Whether petitioners are entitled to qualified immunity because it was not clearly established in 2004 that police officers violate the Fourth Amendment when they use deadly force to prevent a suspect who has led them on a high-speed chase through public streets and has operated a vehicle recklessly during a close-quarters encounter from resuming his vehicular flight.

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v.

WHITNE RICKARD, A MINOR CHILD, INDIVIDUALLY, AND AS SURVIVING DAUGHTER OF DONALD RICKARD, DECEASED, BY AND THROUGH HER MOTHER SAMANTHA RICKARD, AS PARENT AND NEXT FRIEND

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether law-enforcement officers who use deadly force to prevent a suspect from resuming a dangerous vehicular flight through public roads are entitled to qualified immunity from suit under 42 U.S.C. 1983. The same principles of qualified immunity that apply in civil actions against state and local officials under Section 1983 apply in civil actions against federal officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). The United States has an interest both in ensuring the effective deterrence of unconstitutional conduct and in protecting its

employees from unduly burdensome litigation. In addition, the standard for determining whether a right is "clearly established" when an official asserts qualified immunity in civil litigation is identical to the standard for deciding whether a criminal defendant charged under 18 U.S.C. 241 or 242 had "fair warning" that he or she was violating a constitutional right. See *Hope* v. *Pelzer*, 536 U.S. 730, 740 (2002). The United States therefore has a substantial interest in the Court's disposition of this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth and Fourteenth Amendments and 42 U.S.C. 1983 are reprinted in the appendix to this brief. App., *infra*, at 1a-3a.

STATEMENT

This case concerns a vehicular pursuit of a motorist by police officers that took place in 2004. The pursuit began in West Memphis, Arkansas, and ended in Memphis, Tennessee, when police officers fatally shot the driver and his passenger. Many of the events are captured on video recorded by three separate police-cruiser dashboard cameras. See J.A. 205-207 (identifying videos from patrol cars Nos. 279, 284, and 286, which are on file with the Court). The driver's survivors brought suit under 42 U.S.C. 1983 against each of the six officers involved in the pursuit.

1. Around midnight on July 18, 2004, Officer Joseph Forthman, a member of the West Memphis police force, pulled over an automobile driven by respondents' decedent Donald Rickard after noticing that it had an inoperable headlight. Pet. App. 19; see No. 279 Video 11:08:13. In the passenger seat of the vehicle was Kelly Allen. Pet. App. 19. As Officer

Forthman approached the driver's side, he noticed a large indentation in the windshield, "roughly the size of a head or a basketball." *Ibid.* (quoting defendants' statement of facts). After asking for Rickard's license and registration, Officer Forthman inquired about the windshield. *Ibid.*; No. 279 Video 11:08:24. Allen told him that it had broken after the car had hit a curb. Pet. App. 19-20. Officer Forthman then asked Rickard if he had been drinking alcohol and twice ordered him to step out of the vehicle. See *id.* at 20; No. 279 Video 11:08:57.

Instead of complying with the officer's instruction, however, Rickard sped away east on Highway I-40 toward the Arkansas-Tennessee border. See Pet. App. 20; No. 279 Video 11:09:20. Officer Forthman reported over his radio that a "runner" had fled a traffic stop and then proceeded to pursue Rickard. Pet. App. 20; No. 279 Video 11:09:35. He was quickly joined by fellow West Memphis police officer Vance Plumhoff, who became the lead officer in the pursuit. See Pet. App. 20. West Memphis Officers Jimmy Evans, Lance Ellis, Troy Galtelli, and John Gardner also eventually joined the chase, each in separate vehicles. *Id.* at 20-21. The vehicles driven by Officers Fortham, Ellis, and Galtelli each had a functioning dashboard camera that captured some of the ensuing events. See *id.* at 19-21.

The high-speed pursuit lasted for nearly five minutes, during which time Rickard swerved in and out of traffic. See No. 279 Video 11:09:20-11:14:15; Pet. App. 37-38. At one point, Officer Evans maneuvered his vehicle in front of Rickard's to perform a "rolling roadblock," and as he was doing so, Officer Plumhoff reported over the police radio that Rickard

had tried to ram his vehicle. See Pet. App. 21; No. 279 Video 11:11:36. Officer Forthman then stated over the radio that Rickard had tried to "ram another car." Pet. App. 21 (quoting defendants' statement of facts); No. 279 Video 11:11:41. Based on those actions, Officer Forthman told his fellow officers that they had "aggravated assault charges on him." Pet. App. 22; No. 279 Video 11:11:45.

As the pursuit continued, Rickard led the officers over the Mississippi River from Arkansas into Memphis, Tennessee. Pet. App. 22; No. 279 Video 11:12:33. Around that time, Officer Plumhoff reported over the radio that Rickard had committed another aggravated assault. Pet. App. 22; No. 279 Video 11:12:33. Once over the bridge, Rickard exited the highway. Pet. App. 22; No. 279 Video 11:13:18. As he made a quick turn, his car hit a police vehicle and spun around in a parking lot. Pet. App. 22. He then collided head-on with Officer Plumhoff's vehicle, although it is disputed whether he intended to do so. See *id.* at 22-23. His vehicle came to a stop adjacent to a building. See *id.* at 23; No. 279 Video 11:14:15.

Some of the officers then exited their vehicles and surrounded Rickard's car in a semicircle. Pet. App. 23; No. 279 Video 11:14:17. He immediately began to back up in an attempt to evade capture. Pet. App. 23; No. 279 Video 11:14:18; No. 286 Video 12:17:42. Officer Evans banged the butt of his gun against the window of Rickard's vehicle. No. 279 Video 11:14:19; No. 286 Video 12:17:43. As other officers approached Rickard's vehicle, its wheels were spinning and it moved slightly forward into Officer Gardner's vehicle. Pet. App. 23; No. 279 Video 11:14:23; No. 286 Video 12:17:43.

Officer Plumhoff, gun drawn, approached the vehicle very close to its front right tire. He then fired at Rickard three times. Pet. App. 23; No. 279 Video 11:14:21. Rickard nevertheless continued his attempt to escape, "revers[ing] in a 180 degree arc" onto the street, forcing Officer Ellis to step aside to avoid being hit. Pet. App. 24; No. 279 Video 11:14:24. Rickard put the vehicle in drive and started to head away from the officers. No. 279 Video 11:14:29; No. 284 Video 12:17:10. Officer Gardner then fired ten shots into the vehicle, at first from the passenger side and then from the rear as the vehicle moved farther away. Pet. App. 24; No. 279 Video 11:14:30; No. 284 Video 12:17:11; No. 286 Video 12:17:53. At the same moment, Officer Galtelli fired two shots into Rickard's vehicle. Pet. App. 24.

Rickard lost control of the vehicle and crashed into a building. Pet. App. 24; No. 279 Video 11:14:33-11:14:51. Rickard and Allen both died—Rickard from multiple gunshot wounds and Allen from the combined effect of a single gunshot wound to the head and the crash. Pet. App. 24; J.A. 60-61, 76-77 (autopsy reports).

2. Rickard's survivors (respondents here) sued the six officers involved in the chase (petitioners here) under 42 U.S.C. 1983 in the United States District Court for the Western District of Tennessee. They alleged, among other things, that petitioners' use of force had violated the Fourth Amendment. See *Tennessee* v. *Garner*, 471 U.S. 1, 9-12 (1985).

Petitioners moved for summary judgment or dismissal on the ground that they were entitled to qualified immunity from that claim. See *Saucier* v. *Katz*, 533 U.S. 194, 204-207 (2001). They argued that they

had not violated the Fourth Amendment and that, even if they had, it was not "clearly established" in 2004 that their actions violated Rickard's Fourth Amendment rights. Pet. App. 30. In support of their summary-judgment motion, petitioners submitted the three videos of the chase and sworn affidavits and deposition testimony by the officers. Each of the three officers who fired shots—Plumhoff, Gardner, and Galtelli—stated that he had feared that Rickard was threatening the officers with serious bodily injury or death, and Officers Gardner and Galtelli stated that they had believed that Rickard posed a threat to the general public. J.A. 183, 217, 224. As Officer Plumhoff recalled in his deposition, when he "heard the engine start to race and tires barking, squealing," as he stood next to the vehicle, he felt "like, oh, God, I'm about to get killed." J.A. 183.

3. The district court denied qualified immunity. See Pet. App. 30-42, 61-62.

a. The court first analyzed whether respondents had presented sufficient evidence to present their Fourth Amendment claim to a jury. See Pet. App. 32-41. The court explained that excessive-force claims are evaluated under the Fourth Amendment's reasonableness standard, which "asks whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 32-33 (internal quotation marks and citation omitted). That inquiry, the court said, requires a "measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Id.* at 33 (citation omitted).

Applying that standard to the evidence proffered in petitioners' summary-judgment motion, the district court concluded that "[t]he undisputed facts do not support th[e] assertion" that petitioners' actions complied with the Fourth Amendment. Pet. App. 35. The court found significant that Officer Plumhoff had fired the first shots from what the court deemed to be the side of Rickard's vehicle, not the front of it; that Officers Gardner and Galtelli had fired their weapons "as the vehicle was passing or had passed the officers"; that no officers thought that Rickard or Allen was armed; and that Rickard was initially stopped for driving with an inoperable headlight, a misdemeanor under Arkansas law. *Id.* at 35-36; see Ark. Code Ann. §§ 27-36-204, 27-37-101 (West 2004).

The district court discounted the officers' testimony that Rickard had assaulted them with his vehicle during the chase, stating that whether those assaults occurred was disputed because the videos did not show them. Pet. App. 36-37. The court also found insufficient to justify the use of deadly force the fact that Rickard was driving dangerously at high speeds—"changing lanes and swerving through traffic"—and therefore posed a danger to civilians. See *id.* at 37-38. His dangerous driving was irrelevant to the Fourth Amendment question, the court believed, because it was "caused by the pursuit of the Rickard vehicle" by the officers. *Ibid.* According to the court, Rickard's reckless driving indicated that the officers should have ended the chase, because "[t]he only objectively reasonable threat that Rickard posed was the threat that the officers also posed by participating in the pursuit." *Ibid.*

The district court also dismissed petitioners' argument that Rickard had threatened their safety at the scene of the shooting. See Pet. App. 39-40. The court found it "not clear that his evasion of arrest was sufficiently dangerous to justify deadly force." *Id.* at 39. Although the video shows Rickard's car moving forward into Officer Gardner's vehicle, the court deemed it to be a "disputed issue" whether Rickard's car was "revving" when Officer Plumhoff fired the first shots. *Id.* at 40. And it noted that Rickard was driving away from the officers when Officers Gardner and Galtelli discharged their weapons. *Ibid.*

b. The district court then turned to the question whether it was "clearly established" in 2004 that petitioners had violated Rickard's Fourth Amendment rights. In a short discussion, the court held that it was. See Pet. App. 41-42. The court rested that conclusion on its determination that "the facts here do not support a finding that a reasonable officer would have considered the fleeing suspects a clear risk to others." *Id.* at 42.

4. a. Petitioners filed an interlocutory appeal of the district court's denial of qualified immunity. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985). The court of appeals initially dismissed the appeal as barred by *Johnson* v. *Jones*, 515 U.S. 304 (1995), which held that federal appellate courts lack jurisdiction to consider an interlocutory appeal challenging "a *fact*-related dispute about the pretrial record" relevant to qualified immunity—*i.e.*, "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Id.* at 307. See 11-5266 Docket entry (6th Cir. July 5, 2011) (Order of Dismissal). In response to petitioners' rehearing petition,

however, the court vacated that order, concluding that "it appears that we have jurisdiction over at least some of the individual defendants' appellate issues." 11-5266 Docket entry (6th Cir. Sept. 14, 2011) (Order).

b. The court of appeals affirmed the district court's qualified-immunity ruling. See Pet. App. 1-15. Addressing the jurisdictional question, the court interpreted *Jones* together with *Scott* v. *Harris*, 550 U.S. 372 (2007), to require the court to undertake a review of the whole record to determine whether the district court's determination that genuine disputes of material fact exists was clearly incorrect. See Pet. App. 8, 11-12.

The court of appeals then held that the officers were not entitled to qualified immunity because, viewing the disputed facts in the light most favorable to respondents, it could not "conclude that the officers' conduct was reasonable as a matter of law." Pet. App. 10. The court found particularly important the differences it perceived between this case and *Scott*, in which this Court held that a police officer's use of deadly force to terminate a high-speed pursuit did not violate the Fourth Amendment. See 550 U.S. at 381-386. The court acknowledged that "the framework of the two cases is similar," but it stated that the differences in their "details" rendered *Scott* "distinguishable." Pet. App. 8-9. "The fleeing motorist in *Scott*," the court said, "was still fleeing at very high speeds when he was rammed from behind" by a police cruiser, while in this case "the fleeing vehicle was essentially stopped and surrounded by police officers and police cars[,] although some effort to elude capture was still being made." *Id.* at 9. The court deemed it significant that in *Scott* the police had used a vehicle

maneuver to end the chase, whereas "the police here fired fifteen shots at close range." *Ibid.* It also found significant that the suspect's vehicle in *Scott* did not contain any other persons, while here the officers "knew there was a passenger in the fleeing vehicle." *Ibid.*

The court of appeals did not address whether, even if the officers' actions were unreasonable within the meaning of the Fourth Amendment, those actions violated any rights that were clearly established in 2004.

c. Judge Clay issued a concurring opinion to state his view that, contrary to the implication from a footnote in the majority opinion, there was no need for further discovery on the qualified-immunity issue. See Pet. App. 14-15.

SUMMARY OF ARGUMENT

I. The court of appeals failed to conduct even the most basic inquiries required by this Court's settled precedent on qualified immunity. Under this Court's decisions, a plaintiff seeking to overcome qualified immunity must demonstrate both that the defendant violated a constitutional right and that the right, framed at the appropriate level of specificity, was clearly established at the time that the conduct occurred. See *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012). The court of appeals, however, held that petitioners were not entitled to qualified immunity only because it could not "conclude that the officers' conduct was reasonable as a matter of law." Pet. App. 10. Even if correct, that addresses only whether petitioners violated the Fourth Amendment—the first prong of the qualified-immunity standard. It does not mean

that the right the officers violated was clearly established in 2004.

The court of appeals' analysis, moreover, focused almost exclusively on distinguishing this Court's decision in *Scott* v. *Harris*, 550 U.S. 372 (2007). But *Scott* does not support the view that the putative right at issue here was clearly established in 2004. *Scott* was decided in 2007, and in any event *Scott* held that the Fourth Amendment was *not* violated by the use of deadly force in a similar high-speed pursuit. That *Scott* may be distinguishable does not demonstrate that a reasonable officer would have concluded that the use of force in this case was unconstitutional. Given the court of appeals' complete failure to conduct a proper qualified-immunity analysis, it would be appropriate for this Court to vacate the decision below and remand for an evaluation of the summary-judgment record in light of the proper qualified-immunity standard.

II. If this Court elects in the first instance to reach the question whether petitioners are entitled to qualified immunity, it should hold that they are. Framed at the appropriate level of specificity, the question here is whether in 2004 it was clearly established that the police may not use deadly force to prevent a misdemeanant and his passenger from resuming a dangerous, high-speed chase on public thoroughfares after the driver had recklessly operated the vehicle both during the chase and in a close-quarters encounter with police. It was not. Neither the pre-2004 decisions of this Court nor those of the two potentially relevant circuits would have provided clear notice to a reasonable officer that the use of force in this case was unconstitutional.

Because the Fourth Amendment question in this case is novel and highly factbound, the better course, even if this Court decides the qualified-immunity issue, is for the Court to decline to decide the constitutional issue, just as the Court has done in recent Fourth Amendment cases. See *Stanton* v. *Sims*, 134 S. Ct. 3, 7 (2013) (per curiam); *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

ARGUMENT

The court of appeals misapplied the qualified-immunity standard set out in numerous decisions of this Court. Ignoring even the most basic aspects of the qualified-immunity analysis, the court of appeals denied immunity after determining only that a genuine question of material fact existed as to whether the officers had acted reasonably in using deadly force—the Fourth Amendment merits question. It never asked whether the putative right, considered at the proper level of specificity, was clearly established in 2004, when the conduct at issue occurred. See *Anderson* v. *Creighton*, 483 U.S. 635, 639-640 (1987). For that reason alone, it would be appropriate for this Court to vacate the decision below and remand for the court of appeals to conduct the qualified-immunity analysis in the first instance. If the Court elects to decide the qualified-immunity question, it should hold that petitioners are entitled to qualified immunity. In 2004, it was not clearly established that a police officer may not use deadly force to prevent a suspect who led police on a dangerous, high-speed chase through public roads and operated his vehicle recklessly during a close-quarters encounter from resuming his vehicular flight.

I. THE COURT OF APPEALS FAILED TO APPLY THE SETTLED QUALIFIED-IMMUNITY FRAMEWORK

A. Section 1983 of Title 42 provides a cause of action against state officials for the deprivation of constitutional rights under color of state law. See 42 U.S.C. 1983. This Court has interpreted Section 1983, as well as the similar implied right of action against federal officials, see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to incorporate common-law principles of official immunity. See *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1661-1662 (2012); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982).

Under those principles, "government officials performing discretionary functions generally are granted a qualified immunity" from suit for alleged constitutional violations. *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999). Qualified immunity shields individuals from suit unless their actions "violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow*, 457 U.S. at 818). The doctrine is designed to ensure both "that fear of liability will not unduly inhibit officials in the discharge of their duties," *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030-2031 (2011) (internal quotation marks omitted), and that capable individuals are not deterred from participating in public service or distracted from the performance of their official responsibilities, *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985). Qualified immunity promotes those objectives by affording "both a defense to liability and a limited entitlement not to stand trial or face the other bur-

dens of litigation." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (internal quotation marks omitted).

Defeating a claim of qualified immunity requires a plaintiff to plead and ultimately prove that (i) the defendant committed "a violation of a constitutional right" and (ii) "the right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). To determine whether a right was "clearly established," a court must first define the right at the appropriate level of specificity. That is because framed at the broadest level—*e.g.*, the right to be free from unreasonable searches and seizures—any constitutional right would be clearly established, and thus no official would be entitled to qualified immunity. See *Wilson*, 526 U.S. at 615; *Anderson*, 483 U.S. at 639. Accordingly, a right must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012) (quoting *Anderson*, 483 U.S. at 640).

Once the right is properly framed, a court must ask whether "every reasonable official would [have understood] that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093 (citation and internal quotation marks omitted; brackets in original). For that to be true, "existing precedent must have placed the * * * constitutional question beyond debate." *Ibid.* (citation omitted). This requires either "controlling authority" or "a robust 'consensus of cases of persuasive authority'" establishing that the official's conduct was unconstitutional. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (quoting *Wilson*, 526 U.S. at 617). Although the authority need not be "directly on

point," it must be sufficiently similar to place the relevant constitutional question "beyond debate." *Id.* at 2083.

B. The court of appeals in this case entirely failed to determine whether the putative right at issue was clearly established in 2004, when the vehicular pursuit and shooting took place. The words "clearly established" do not appear in its opinion, and the court did not undertake the basic inquiries required by this Court's decisions: defining the right at the appropriate level of specificity, canvassing pertinent authority, and ultimately determining whether a reasonable official would have understood clearly that her conduct violated the Constitution at the time it occurred.

Instead of following that framework, the court of appeals denied immunity on the ground that it could not "conclude that the officers' conduct was reasonable as a matter of law." Pet. App. 10. But that addresses only the Fourth Amendment merits question —*i.e.*, the first prong of the qualified-immunity standard. See *Scott* v. *Harris*, 550 U.S. 372, 381 (2007). Even if correct, that conclusion would not mean that it was "clearly established" in 2004 that the officers' actions violated the Fourth Amendment.

Indeed, this Court has repeatedly underscored that the Fourth Amendment reasonableness inquiry is not coextensive with the question whether the right was clearly established at the relevant time. See *Saucier* v. *Katz*, 533 U.S. 194, 203-205 (2001); *Anderson*, 483 U.S. at 643-644. With respect to excessive-force claims in particular, "[t]he inquiries for qualified immunity and excessive force remain distinct." *Saucier*, 533 U.S. at 204. For example, if an officer makes a reasonable mistake "as to whether a particular

amount of force is legal in th[e] circumstances," he is entitled to qualified immunity even if a court would ultimately conclude that his actions violated the Fourth Amendment. *Ibid.* That "breathing room," *Stanton* v. *Sims*, 134 S. Ct. 3, 5 (2013) (quoting *al-Kidd*, 131 S. Ct. at 2085), is particularly important in the excessive-force context. Because judicial decisions do "not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts," the requirement that the particularized right be clearly established "protect[s] officers from the sometimes hazy border between excessive and acceptable force." *Saucier*, 533 U.S. at 205-206 (citation and internal quotation marks omitted).

The court of appeals' nuanced comparison of the "details" of *Scott* and this case, Pet. App. 9, also illustrates how far that court strayed from this Court's established framework. *Scott*, which was decided three years after the events that occurred here, rejected an excessive-force claim on the merits after concluding that an officer had acted reasonably in ramming a suspect's car from behind during a high-speed chase. See 550 U.S. at 381-386. That this case may be "distinguishable" from *Scott* says nothing about whether it was clearly established in 2004 that the officers' actions violated the Fourth Amendment.

C. At the certiorari stage, respondents suggested that the "procedural history of the case" explains the court of appeals' failure to address whether the relevant constitutional right was clearly established. Br. in Opp. 12. In particular, respondents cited the court's apparent view that it lacked jurisdiction over some of petitioners' objections under *Johnson* v. *Jones*, 515 U.S. 304 (1995). See pp. 8-9, *supra*.

Johnson does not explain the court of appeals' failure to conduct a proper qualified-immunity analysis. Under *Johnson*, the court of appeals was generally required to accept the district court's determination of what facts respondents could prove at trial unless its conclusions were "blatantly contradicted by the record" (especially the video evidence). *Scott*, 550 U.S. at 380; see *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996) ("*Johnson* held * * * that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case."). But once those facts were assumed, the court of appeals was required to determine whether that version of the facts demonstrated a violation of a constitutional right that was clearly established in 2004. Cf. *Scott*, 550 U.S. at 381 n.8 ("At the summary judgment stage, * * * the reasonableness of [an officer's] actions * * * is a pure question of law."). The court of appeals failed to address that question.

II. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY

It would be appropriate for this Court to dispose of this case by vacating the court of appeals' judgment and remanding for that court in the first instance to evaluate the summary-judgment record in light of the proper qualified-immunity standard. See, *e.g.*, *Anderson*, 483 U.S. at 641, 646 & n.6. If the Court concludes that it is appropriate to conduct the qualified-immunity analysis itself, in the view of the United States, petitioners are entitled to qualified immunity. Even assuming that petitioners' actions violated the Fourth Amendment, the right they violated, defined

at the appropriate level of specificity, was not clearly established in 2004.

A. The first step in analyzing whether a right was "clearly established" is to define the right at the appropriate level of specificity. See *Wilson*, 526 U.S. at 615; *Anderson*, 483 U.S. at 639; p. 14, *supra*. As this Court has consistently instructed, the inquiry into whether an official's actions violated clearly established law "must be undertaken in light of the specific context of the case, not as a broad general proposition," *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201), although it is not necessary that "the very action in question [have] previously been held unlawful," *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377 (2009) (brackets in original).

Thus, for example, in *Saucier*, an excessive-force case, the Court framed the relevant inquiry not in terms of "the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness," but instead in terms of whether a "reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene, where the Vice President was speaking and respondent had just approached the fence designed to separate the public from the speakers, was within the bounds of appropriate police responses." 533 U.S. at 201-202, 208. Likewise, in *Brosseau*, another excessive-force case, the Court asked whether it was clearly established that an officer may not "shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." 543 U.S. at 199-200.

Those decisions suggest that to define the right at issue in an excessive-force claim, a court should consider at least (i) the characteristics of the individuals against whom the force was used; (ii) the behavior of those individuals; (iii) the risk to other people posed by that behavior; and (iv) the level of force used by the officer.

Here, it is undisputed that Rickard had led officers on a "high-speed chase," Pet. App. 36, and at that time was "changing lanes and swerving through traffic," *id.* at 38, in an attempt to evade capture, and that, once cornered, "Rickard reversed in an attempt to escape" and continued that attempt even after the initial shots were fired, *id.* at 23. The video evidence demonstrates, moreover, that Rickard was operating the vehicle in a reckless manner during his close-quarters encounter with police, in which he made a series of sudden maneuvers with the car despite the fact that the officers were standing only steps away and ordering him to stop. See No. 279 Video 11:14:16-11:14:32; No. 286 Video 12:17:41-12:17:53. It is also uncontested that there was a passenger in the car and that Officer Plumhoff knew that when he fired the first shots. See J.A. 392. Therefore, the qualified-immunity question is whether a police officer may shoot a motorist who, having been stopped initially for a misdemeanor with a passenger in the vehicle, leads the police on a high-speed chase through public streets and then, once cornered, operates a vehicle in a dangerous manner in an attempt to evade capture and resume his flight.[1]

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[1] It was well established in 2004 that an officer may use deadly force against a suspect who poses an immediate and serious threat to himself or fellow officers. See *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985). Thus, in some circumstances, it would be appropriate to

B. As so framed, the right at issue here was not clearly established in 2004.

1. No decision of this Court clearly established in 2004 that law-enforcement officers, confronted with a suspect who has previously led them on a dangerous, high-speed chase, and who operated a vehicle in a dangerous manner once cornered, may not use deadly force to prevent the suspect from resuming his vehicular flight. Under the standard announced in *Tennessee* v. *Garner*, 471 U.S. 1 (1985), "[w]here [an] officer has probable cause to believe that [a] suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.* at 11. But "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." *Ibid.*

That "general constitutional rule" does not bar petitioners' conduct with "obvious clarity." *Hope*, 536 U.S. at 741 (quoting *United States* v. *Lanier*, 520 U.S. 259, 271 (1997)). Reckless driving in a high-speed pursuit does pose a significant risk to other people.

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add an additional factor to the definition of the right: that the suspect, in his attempt to evade capture, posed an immediate threat to the safety of the officers. Here, however, the district court concluded that a genuine dispute of material fact exists about the danger Rickard posed to the officers, relying in part on the fact that Officer Plumhoff was standing slightly to the side of Rickard's vehicle when he fired the first shots and thus was "in no danger of being hit by the vehicle." Pet. App. 35. Because the other facts make clear that qualified immunity is appropriate here, this Court need not seek to determine whether the district court's assessment comports with the video evidence. See No. 279 Video 11:14:15-11:14:32.

This Court explained in *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), in the course of construing the term "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), that vehicular flight from police officers "as a categorical matter * * * presents a serious potential risk of physical injury to another" because "[r]isk of violence is inherent to vehicle flight." 131 S. Ct. at 2273-2274. Vehicular flight, this Court concluded, "has violent—even lethal—potential for others." *Ibid.*; see also *id.* at 2289 (Kagan, J., dissenting) (explaining that "willfully flee[ing] from a law enforcement officer by driving at high speed or otherwise demonstrating reckless disregard for the safety of others * * * ordinarily presents a serious potential risk of physical injury to another") (internal quotation marks and citation omitted). Moreover, here, as the video makes clear, Rickard not only led police on a high-speed chase, he operated the vehicle recklessly during his subsequent close-quarters encounter with police. Given that, it would not have been "plainly incompetent," *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986), for a law-enforcement officer in 2004 to conclude that petitioners' use of deadly force was constitutional.

None of this Court's applications of *Garner*'s rule to a particular fact pattern placed the contrary view "beyond debate" in 2004. *Reichle*, 132 S. Ct. at 2093. *Garner* itself involved an unarmed suspect fleeing on foot, not a motorist who had already demonstrated a willingness to put people's lives in danger with his driving. Likewise, *Graham* v. *Connor*, 490 U.S. 386 (1989), did not involve a high-speed chase or any other conduct by the plaintiff that posed a danger to other people. See *id.* at 388-389. And *Saucier* did not in-

volve a high-speed chase or any other dangerous conduct, did not address the use of deadly force, and did not find that a constitutional violation had occurred. See 533 U.S. at 197-198. None of those decisions supports respondents' view that it was clearly established in 2004 that petitioners' use of force violated the Fourth Amendment. Because reasonable minds might have reached different conclusions, the "constitutional question * * * [wa]s by no means open and shut." *Wilson*, 526 U.S. at 615.[2]

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[2] The United States Department of Justice has as a policy matter defined "deadly force" as "the use of any force that is likely to cause death or serious physical injury." *Commentary Regarding the Use of Deadly Force in Non-Custodial Situations* Pt. II, http://www.justice.gov/ag/readingroom/resolution14c.htm (last visited Jan. 3, 2014) (*Commentary*). The Department's policy statement provides that "[d]eadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person." *Policy Statement, Use of Deadly Force* Pt. I(A), http://www.justice.gov/ag/readingroom/resolution14b.htm (last visited Jan. 3, 2014). It further provides that "[w]eapons may not be fired solely to disable moving vehicles" and that "[w]eapons may be fired at the driver or other occupant of a moving motor vehicle only when * * * [t]he officer has a reasonable belief that the subject poses an imminent danger of death or serious physical injury to the officer or another; and * * * [t]he public safety benefits of using such force outweigh the risks to the safety of the officer or other persons." *Id.* Pt. V. The Commentary to the policy, however, notes that "the Department deliberately did not formulate this policy to authorize force up to constitutional or other legal limits." *Commentary* Pt. I. In addition, the Commentary emphasizes that "[t]he reasonableness of a belief or decision must be viewed from the perspective of the officer on the scene,

The court of appeals placed considerable weight on *Scott*. But that case was decided in 2007. It therefore "could not have given fair notice to [petitioners]" of what the Fourth Amendment requires. *Brosseau*, 543 U.S. at 200 n.4. And in any event, *Scott* does not clearly establish that petitioners' attempt to put an end to Rickard's high-speed flight violated the Fourth Amendment.

As discussed above, *Scott* considered the constitutionality of an officer's "attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind." 550 U.S. at 374. Applying the Fourth Amendment's reasonableness standard, the Court considered significant that the plaintiff "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." *Id.* at 384. The Court also noted, however, that although the ramming maneuver "posed a high likelihood of serious injury or death" to the plaintiff, it did not entail "the near *certainty* of death posed by * * * pulling alongside a fleeing motorist's car and shooting the motorist." *Ibid.* The Court then undertook to "weigh[] the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing [the plaintiff]," in light of the fact that the plaintiff was the only culpable party. *Ibid.* The Court ultimately concluded that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not

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who may often be forced to make split-second decisions in circumstances that are tense, unpredictable, and rapidly evolving." *Id.* Pt. II.

violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386.

If anything, that conclusion lends support to petitioners' argument that it was not clearly established in 2004 that their actions violated the Fourth Amendment. Rickard engaged in a "dangerous high-speed car chase that threaten[ed] the lives of innocent bystanders," *Scott*, 550 U.S. at 386, and petitioners used deadly force to terminate that chase after Rickard operated the vehicle in a reckless manner in an attempt to escape. Although the deadly force here was used during a period in which Rickard was not driving at high speeds, the district court found that it was undisputed that at that time Rickard was attempting to evade capture by getting back on the road. See Pet. App. 23. If successful in that attempt, Rickard might have posed precisely the same threat to innocent bystanders as the motorist in *Scott*.

Moreover, *Scott* makes clear that the district court erred in determining that the dangers Rickard posed to the public by "swerving in traffic while traveling at a high speed" and operating the vehicle with "disregard for the safety of others" were irrelevant to the Fourth Amendment analysis because they "were caused by the [officers'] pursuit of [his] vehicle." Pet. App. 37. The Court explained that it was "loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger." *Scott*, 550 U.S. at 385. A reasonable officer reviewing that discussion could conclude that she was not clearly required by the Constitution to give up the chase rather than use deadly force.

That is not to say that *Scott* is necessarily on all fours. For example, *Scott* did not address (and indeed distinguished) a situation, like the one here, in which an officer fires a weapon in an effort to stop the suspect's vehicular flight. See 550 U.S. at 384. And *Scott* likewise did not address a situation, like the one here, in which an officer is aware of the presence of an apparently innocent passenger whose safety would be affected by the use of force. But *Scott* itself did not clearly establish that the presence of either (or both) of those factors would render an officer's actions unconstitutional.

Accordingly, even if *Scott* had been on the books in 2004, a reasonable officer reviewing the opinion could have believed that it did not clearly forbid petitioners' use of force here.

2. In its qualified-immunity decisions, this Court has looked to circuit precedent to determine whether a constitutional principle was "clearly established." See *Pearson*, 555 U.S. at 244; *Brosseau*, 543 U.S. at 200-201; *Safford Unified Sch. Dist. No. 1*, 557 U.S. at 378; *Hope*, 536 U.S. at 742-744. Here, the relevant circuit decisions do not demonstrate that petitioners violated Rickard's clearly established Fourth Amendment rights.

a. This case raises the unusual circumstance in which a vehicular pursuit began in one circuit (the Eighth) but the ultimate use of force occurred in another circuit (the Sixth). For that reason, the question arises which circuit authority should be considered "controlling," *Reichle*, 132 S. Ct. at 2094, in the qualified-immunity analysis. Ultimately, however, this case does not require the Court to resolve that issue, because under the law of both the Sixth and Eighth

Circuits in 2004, a reasonable officer could have believed that petitioners' use of force complied with the Fourth Amendment.

b. A reasonable officer canvassing Sixth Circuit precedent in 2004 would not have had clear notice that the Fourth Amendment prohibits the use of deadly force to prevent a person who has just led police on a high-speed, dangerous chase, and who operated a vehicle in a dangerous manner once stopped, from returning to the public roads. That circuit's most analogous pre-2004 decision, *Smith* v. *Freland*, 954 F.2d 343, cert. denied, 504 U.S. 915 (1992), also involved a police officer who shot a fleeing motorist to prevent him from returning to the road. In *Smith*, as here, the suspect had committed a minor traffic infraction (running a stop sign), which led to a high-speed chase. See *id.* at 344. As this Court explained in *Brosseau*, the chase "appeared to be at an end when [an] officer cornered the suspect at the back of a dead-end residential street." 543 U.S. at 200. But "[t]he suspect * * * freed his car and began speeding down the street," at which point "the officer fired a shot, which killed the suspect." *Ibid.* The Sixth Circuit held that the officer's actions did not violate the Fourth Amendment. It relied on the fact that "the suspect * * * 'had proven he would do almost anything to avoid capture' and that he posed a major threat to, among others, the officers at the end of the street." *Ibid.* (quoting *Smith*, 954 F.2d at 347). The Sixth Circuit further explained that even though the motorist did not have a firearm, "he was not harmless; a car can be a deadly weapon." 954 F.2d at 347.

A reasonable officer familiar with *Smith* could have concluded in 2004 that the use of force in this case was

not clearly prohibited because Rickard's reckless operation of the vehicle posed a danger to the public. As the Sixth Circuit later characterized its holding in *Smith*, "even though [the motorist] was unarmed and [the officer] may not have been in any immediate personal danger when he discharged his weapon, his actions were clearly reasonable given that these events happened very quickly and [the motorist's] continued escape would have posed a significant threat of injury to numerous others." *Dudley* v. *Eden*, 260 F.3d 722, 726 (2001). Although there are differences between *Smith* and this case—the suspect in *Smith* had indisputably assaulted a police officer during the chase and had crashed into an officer's unoccupied car when cornered—a reasonable officer could have concluded that those facts did not play a decisive role in the court's legal analysis.

Post-*Smith*, pre-2004 decisions of the Sixth Circuit also upheld under the Fourth Amendment the use of deadly force in reasonably similar circumstances. See *Dudley*, 260 F.3d at 727 (finding no Fourth Amendment violation for police shooting of bank-robbery suspect who had dangerously fled officers in vehicle); *Scott* v. *Clay Cnty., Tenn.*, 205 F.3d 867, 877-878, cert. denied, 531 U.S. 874 (2000) (finding no Fourth Amendment violation for police shooting of motorist after high-speed flight with a passenger in the vehicle). The Sixth Circuit has issued some decisions after 2004 denying qualified immunity to officers who fired at fleeing motorists. But even if those decisions had relevance here, none of them involved a suspect who had already engaged in dangerous driving and was attempting dangerously to evade apprehension after being cornered, and none interpreted the circuit's pre-

2004 precedents in a manner that would have clearly foreclosed the use of force here. See *Kirby* v. *Duva*, 530 F.3d 475, 482 (2008) (motorist "was moving slowly and in a non-aggressive manner, could not have hit any of the officers, and was stationary at the time of the shooting"); *Smith* v. *Cupp*, 430 F.3d 766, 769, 773-774 (2005) (suspect stole police car and was driving in a way that posed no risk to others); see also *Murray-Ruhl* v. *Passinault*, 246 Fed. Appx. 338, 340-342, 344-347 (6th Cir. 2007) (suspect attempted to evade capture by driving out of an alley past the police in a way that did not "pose[] a threat to anyone").

c. The pertinent Eighth Circuit authority also fails to demonstrate that petitioners' use of deadly force in the circumstances of this case was clearly foreclosed in 2004. In *Cole* v. *Bone*, 993 F.2d 1328 (1993)—also cited by this Court in *Brosseau*, 543 U.S. at 200—a high-speed pursuit began when the suspect drove a truck through a toll booth without stopping to pay the toll. See 993 F.2d at 1330. As here, the suspect was driving recklessly at high speeds, and the police had unsuccessfully attempted to execute a rolling roadblock. See *ibid.* But in addition, the protracted chase in *Cole* took place on congested roads, and during the chase the driver "forced more than one hundred cars off the road or out of the truck's way," including police vehicles, "and endangered the lives of many other motorists." *Id.* at 1331, 1333-1334. Eventually an officer shot out the back window of the truck and then shot the suspect in the head. See *id.* at 1331. The Eighth Circuit held that the shooting did not violate the Fourth Amendment. Because the officer "had probable cause to believe that the truck posed an imminent threat of serious physical harm to innocent

motorists as well as to the officers themselves" and that he had committed a crime by attempting to force officers off the road, the court determined that the "use of deadly force was constitutionally reasonable under *Garner*." *Id.* at 1333-1334.

A reasonable officer familiar with *Cole* would not have been on clear notice in 2004 that the decision unequivocally foreclosed petitioners' use of force. Although the district court in this case concluded that there exists a genuine dispute of material fact over whether Rickard assaulted any officers during the chase, it was reasonable for an officer in 2004 to believe that *Cole* did not foreclose the use of force even if a suspect does not assault officers, so long as he continues to pose a threat to the public through his reckless operation of a vehicle.

In *McCaslin* v. *Wilkins*, 183 F.3d 775 (1999), the Eighth Circuit upheld the denial of qualified immunity at summary judgment in a case that involved a shooting after a police chase. See *id.* at 778-779. The court's decision, however, rested on the district court's conclusion that there existed a genuine issue of material fact as to whether the suspect, after his car had careened into a ditch, had attempted to restart his vehicle and drive it toward police officers. See *id.* at 777. Although the officers claimed that he had "dr[iven] back up the hill at them, forcing them to protect themselves by firing several shots," other witnesses said that "the gunshots began almost immediately after [the suspect's] truck left the road" and that he had not turned the truck toward the officers. See *ibid.* The Eighth Circuit concluded that the factual question precluded summary judgment for the defendants, distinguishing *Cole* on the ground that in

that case "there was no dispute regarding what the driver was doing at the time the officer shot and killed him." *Ibid.* Here, as in *Cole*, there is no dispute that Rickard was trying to get back on the road when he was shot. See Pet. App. 23. A reasonable officer who had read *McCaslin* would not necessarily believe that shooting a suspect attempting to resume a dangerous vehicular flight is the Fourth Amendment equivalent of shooting a motorist sitting in a vehicle at rest in a ditch.

d. In sum, it was not clearly established in either the Sixth Circuit or the Eighth Circuit in 2004 that it violates the Fourth Amendment to use deadly force to prevent the flight of a motorist who operated a vehicle recklessly during a high-speed chase and in a close-quarters encounter with police. And respondents have not pointed to "a robust consensus of cases of persuasive authority" from other circuits as of 2004 supporting their claim. *al-Kidd*, 131 S. Ct. at 2084 (internal quotation marks and citation omitted).

C. Because it was not clearly established in 2004 that petitioners' actions violated the Fourth Amendment, they are entitled to summary judgment on qualified immunity. In *Pearson*, this Court held that courts may, in their discretion, resolve questions of qualified immunity on the "clearly established" prong without deciding whether a constitutional violation occurred, overruling its contrary conclusion in *Saucier*. See 555 U.S. at 236-243. The Court explained that deciding the constitutional question even where the law was not clearly established departs from "the general rule of constitutional avoidance and runs counter to the 'older, wiser judicial counsel 'not to pass on questions of constitutionality . . . unless

such adjudication is unavoidable.'" *Id.* at 241 (quoting *Scott*, 550 U.S. at 388 (Breyer, J., concurring) (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944))).

In light of those principles, the United States respectfully advises that the better course in this case is to decline to reach the constitutional question, as this Court has done in a number of recent decisions. See *Stanton*, 134 S. Ct. at 7; *Reichle*, 132 S. Ct. at 2093-2094; *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1249 (2012); *Pearson*, 555 U.S. at 243-245; *Brosseau*, 543 U.S. at 198. *Pearson* explained that "there are cases in which the constitutional question is so fact-bound that the decision provides little guidance for future cases." 555 U.S. at 237. This may be one of those cases. As the court of appeals found, it is difficult to determine "the degree of danger that the officers were placed in as a result of Rickard's alleged conduct." Pet. App. 10. Deciding the underlying Fourth Amendment question might require this Court to determine, among other things, the highly case-specific question whether the district court properly concluded from the video evidence that the officers were not in physical danger, see note 1, *supra*. Moreover, the "details" that the court of appeals cited to distinguish *Scott*—that Rickard was not driving at a high speed when he was shot, that the police fired "fifteen shots at close range" rather than using a ramming maneuver, and that a passenger was in the car—may not recur together with any frequency. See Pet. App. 10 (observing that this case "is more complex in its facts than was *Scott*"). Resolving the merits of the Fourth Amendment claim could thus require a

heavily fact-intensive inquiry that might provide little guidance in future cases.

Excessive-force claims "do not frequently arise in cases in which a qualified immunity defense," or the analogous "fair warning" requirement for criminal liability, "is unavailable." *Pearson*, 555 U.S. at 236; see *Hope*, 536 U.S. at 740. For that reason, it would hinder "the development of constitutional precedent" if courts never reached the merits question in excessive-force cases where the right is not clearly established. *Pearson*, 555 U.S. at 236. But cases are likely to arise in the lower courts that entail less factual complexity than this case.

Two other factors, moreover, caution against seeking to resolve the constitutional question here. First, neither the district court nor the court of appeals distinguished among the different officers, even though only three of the six officers discharged their weapons, Officer Plumhoff discharged his weapon at a different point in the sequence of events than Officers Gardner and Galtelli, and the officers fired different numbers of shots. See Pet. App. 11 n.4. Moreover, Officers Gardner and Galtelli each heard over the radio that Rickard had committed aggravated assaults during the chase. See J.A. 216, 222. Even if the district court were correct that a genuine dispute of material fact exists about whether the assaults occurred, Pet. App. 36, Officers Gardner and Galtelli could have reasonably relied on the report of the assaults. Accordingly, a proper Fourth Amendment analysis would require this Court to analyze in the first instance—without the benefit of any discussion from the district court or the court of appeals, and without the

benefit of detailed briefing from the parties—the individual culpability of each of the six officers.

Second, this case presents a situation in which the conduct of the officers removed from the public roads a vehicle that threatened innocent bystanders, but put at risk (and indeed ended) the life of a passenger who, so far as the record reveals, was not believed to have engaged in any culpable conduct. The implications of that fact for the constitutional analysis is one that has not received substantial attention from the lower courts and that seems ill-suited for determination by this Court in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2014

APPENDIX

1. Amendment IV of the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Amendment XIV of the U.S. Constitution provides:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the

members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. 42 U.S.C. 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

AMICUS CURIAE BRIEF

No. 12-1117

In The Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

v.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR *AMICUS CURIAE* PROFESSOR JONATHAN R. NASH IN SUPPORT OF RESPONDENT

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Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 708 (2005) 7

BRIEF FOR JONATHAN R. NASH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Amicus curiae Jonathan R. Nash respectfully submits this brief in support of Respondent in the above-captioned case, *Plumhoff v. Rickard*, which is before the Court on a writ of certiorari from the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae is a law professor who teaches and writes in the areas of environmental law and federal courts. The judicial treatment of risk is a subject in which *amicus* has a special academic interest. His scholarship on this subject has highlighted, among other things, the degree to which criminal law enforcement jurisprudence implicitly takes into account the balancing of risks traditionally associated with

[1] Pursuant to Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party. *Amicus* did not receive any monetary contribution for the preparation or submission of this brief apart from the financial support of Emory University School of Law to defray the costs of printing the brief. The opinions expressed in this brief are those of *amicus* and do not necessarily reflect the views of his academic institution. Pursuant to Supreme Court Rule 37.3(a), letters of consent of the parties to the filing of the brief have been filed with the Clerk of the Court.

risk analysis.[2] *Amicus curiae* is not affiliated with any parties in this case.

SUMMARY OF ARGUMENT

Amicus files this brief to point out that the risk framework highlighted by the Court in *Scott v. Harris*, 550 U.S. 372 (2007), has clear application to this case, and indicates that the court of appeals below correctly concluded that it cannot be said that the police action was objectively reasonable as a matter of law.[3] The *Scott* Court highlighted as relevant to the risk analysis: (i) the number of people exposed to risk, (ii) the culpability of people exposed to risk, and (iii) the extent to which people are exposed to a risk that might lead to death, as opposed to near certainty of death. In this case, firing at the occupants of the car put two people at risk, while, because the car was not then currently fleeing the police at high speed, not incapacitating the driver would not have put large numbers of bystanders at risk. Second, while the driver of the car was culpable for any police or bystanders who might have been injured during the

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[2] *See* Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U. L. REV. 171 (2012).

[3] *Amicus* thus makes no argument with respect to the first question presented to the Court, and on the second question makes no argument as to whether the constitutional right at issue was clearly established.

chase, the passenger in the car, who was also put at risk, was not. Third, the police action here – firing their guns at the driver and passenger from the side and from behind – did subject the car's occupants to a near certainty of death.

ARGUMENT

This Court has made clear that whether police action is objectively reasonable as required by the Fourth Amendment turns on a balancing of interests. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (instructing lower courts to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion"). The Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007), clarified that it is a balancing of *competing risks* that determines objective reasonableness. An examination of the opinion in *Scott* reveals this Court's focus on risk. The Court in *Scott* framed the central issue in the case in terms of risk. *See id.* at 374 ("Can an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist's flight from endangering the lives of innocent bystanders?"). Moreover, the Court's opinion in *Scott* is rife with references to risk and uncertainty. *See, e.g., id.* at 379 n.6 ("Society accepts the risk of speeding ambulances and fire engines in order to save life and property; it need not (and assuredly does not) accept a similar risk posed by a reckless

motorist fleeing the police."); *id.* at 380 ("Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury."); *id.* at 383 ("[I]n judging whether Scott's actions were reasonable, we must consider the risk of bodily harm that Scott's actions posed to respondent in light of the threat to the public that Scott was trying to eliminate."); *id.* at 385 ("Whereas Scott's action – ramming respondent off the road – was *certain* to eliminate the risk that respondent posed to the public, ceasing pursuit was not."); *id.* at 386 ("A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."); *id.* ("The car chase that respondent initiated in this case posed a substantial and immediate risk of serious physical injury to others. . . .").

This Court's opinion in *Scott* thus incorporated what scholars of risk analysis sometimes refer to as "risk-risk analysis." Risk-risk analysis of a possible action calls for balancing the risks that arise by virtue of undertaking the action in question against the risks that arise if the action is not undertaken.[4]

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[4] Risk-risk analysis finds its usual home in the public regulatory setting, where it calls upon regulators to balance the risks that a proposed regulation will reduce against the risks to

(Continued on following page)

It rests upon the recognition that in general one does not simply succeed in reducing risk; instead, one may often in practice "trade off" a reduction in one risk for an increase in another.

In the context of a high-speed police chase, the competing risks arise out of whether the police try to continue the pursuit, abandon the pursuit, or attempt to stop or otherwise disable the fleeing vehicle. Continuing the pursuit may eventually result in the capture of those in the fleeing vehicle, but an ongoing high-speed chase also endangers the police, innocent bystanders (both drivers and pedestrians), and even the people in the fleeing vehicle. Abandoning the pursuit risks having those in the fleeing vehicle escape justice, but it may also reduce the risk of harm to those involved in the chase and bystanders.[5] Attempting to disable the vehicle may reduce the risk to police and bystanders, but at the cost of greater to risk to those inside the vehicle.

The Court in *Scott* concluded that the police decision to try to disable the fleeing vehicle by using a

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which regulation itself may give rise. *See* John D. Graham & Jonathan Baert Wiener, *Confronting Risk Tradeoffs*, *in* RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1, 19-36 (John D. Graham & Jonathan Baert Wiener eds., 1995).

[5] The *Scott* Court noted that the reduction in risk will only materialize if those fleeing *believe* that the police have actually abandoned the pursuit. *See Scott*, 550 U.S. at 385 ("[T]here would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go.").

maneuver to make the car spin out – an action that rendered the fleeing driver a quadriplegic – was objectively reasonable under the circumstances. Application of the framework for risk analysis that this Court outlined in *Scott* confirms that the conclusion of the district court and the court of appeals below – that it cannot be said that the police action was objectively reasonable as a matter of law – was the correct one.[6]

The *Scott* Court emphasized three key dimensions of risk analysis: the relative number of lives put at risk by undertaking, or failing to undertake, the action in question; the relative culpability of the lives

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[6] I have argued elsewhere that the Court's attempt at balancing the risks in *Scott* led the Court to speculate inordinately rather than to conduct a rigorous analysis of the risk-risk tradeoffs. *See* Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U. L. REV. 171, 200-03 (2012). I also have argued that under the conditions of a fast-paced automobile chase, police may be called upon to make quick, and inherently somewhat speculative, risk-risk analyses. *See id.* at 213-15. On either of these bases, it might make sense for this Court one day to reconsider its decision in *Scott*: This Court either might call explicitly for more truly rigorous risk-risk analysis in the context of high-speed police chases, or might again recognize the reality that high-speed police chases make rigorous analysis difficult and thus allow the law to excuse some lack of rigor.

In this Brief, I simply argue that, even retaining the existing *Scott v. Harris* framework for risk analysis, this Court should agree with the court below that it cannot be said that the police action was objectively reasonable as a matter of law, because the facts in *Scott* are materially distinguishable from this case.

put at risk; and the extent to which action, or inaction, will impose a "near *certainty* of death." *Scott*, 550 U.S. at 384.

First, this Court observed that it was "appropriate" to consider "the number of lives at risk." *Scott*, 550 U.S. at 384. This Court highlighted what it perceived to be a tradeoff between the risk to "numerous bystanders" on the one hand, and the risk to "a single person" on the other. *Id.* As thus described by this Court, this aspect of the risk analytic framework bears great similarity to a subspecies of "risk-risk tradeoff" called "life-life tradeoff."[7]

A second factor on which the Court relied in its balancing of the competing risks was the relative culpability of those subject to each risk. In deciding that the imposition of risk on Harris – the fleeing driver – was reasonable, the *Scott* Court emphasized Harris's culpability as compared to the innocence of potential victims of his reckless driving: "We think it appropriate in this process to take into account not

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[7] Professors Cass Sunstein and Adrian Vermeule coined the term with respect to the government's decision whether or not to retain capital punishment for murder convicts. *See* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 708 (2005) (arguing that, to the extent that an execution can be shown to deter more than one murder, a life-life tradeoff arises between the certainty of the lost lives of convicted murderers if capital punishment is available, and the statistical likelihood of losing numerous innocent victims' lives if the death penalty is not available as a deterrent).

only the number of lives at risk, but also their relative culpability." *Id.* Further, this Court made clear, while Harris was culpable, "those who might have been harmed had [the police] not taken the action [they] did were entirely innocent." *Id.*

Third, this Court justified its balancing of the competing risks by emphasizing that, while the police intervention subjected Harris to some risk of death, it was not certain (or even nearly certain) to result in death: while the police actions "posed a high likelihood of serious injury or death to respondent," they did not give rise to "the near *certainty* of death posed by, say, shooting a fleeing felon in the back of the head or pulling alongside a fleeing motorist's car and shooting the motorist." *Id.* (citations omitted). The *Scott* Court's emphasis of the word "*certainty*" highlights the importance the Court assigned to the absence of certainty of death in the risk to which Harris was subjected.

When one applies the three critical risk analytic factors identified by the Court in *Scott* – numerosity, culpability, and near certainty of death – it is clear that the courts below reached the correct decision on this issue.

Consider first the number of lives put at risk. While the fleeing car in *Scott* had inside it only a driver, the fleeing car in this case had in it not only the driver (Rickard) but also a passenger (Allen). Thus, the police decision to attempt to terminate the pursuit by disabling the car and its driver put at risk

twice as many people as did the decision in *Scott*. On the other side of the ledger, the record in this case indicates that, in contrast to *Scott*, the vehicle was not actively fleeing the police at a high speed at the time the police acted. Thus, the number of people at risk was much lower at the time of the police action in this case than it was in *Scott*. Further, the degree to which people were at *imminent* risk was lower, insofar as there was at the time no active high-speed pursuit: While the lives of police officers may have been endangered,[8] there was no imminent risk to numerous bystanders and other drivers. In short, the police action in this case put at risk more people, and reduced what was already a lower imminent risk to fewer people, than did the police action in *Scott*.

Consider next the culpability of those whose lives were put at risk. The car being pursued included a driver and a passenger. That means that firing on the car put at risk not just the driver (Rickard) who was fleeing from police, but also the comparatively innocent passenger (Allen). To be sure, Rickard bore responsibility for any innocent bystanders or police who might have been injured by virtue of his reckless driving, just as the Court noted that Harris bore culpability in *Scott*. However, the record discloses no

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[8] *See Estate of Allen v. City of West Memphis*, 509 Fed. App. 388, 392 (6th Cir. 2012) ("The police make much of the fact that they felt they were in personal danger, but the degree to which that was true is not resolved by the video recordings."), *cert. granted sub nom. Plumhoff v. Rickard*, 134 S. Ct. 635 (2013).

suggestion that the passenger Allen was putting any bystanders or police at risk by virtue of her actions. *See* Pet. App. 21-22 (Lt. Forthman stated over police radio that Rickard "is trying to ram another car" and that "[w]e do [now] have aggravated assault charges on *him*" (emphasis added)). Yet the record does make clear that bullets shot by the police struck not only Rickard, but also Allen. *See* Pet. App. 24.

Last, consider whether the police action imposed a "near *certainty*" of death. In this case, the police fired at Rickard and Allen at close range and from the side and then from behind. *See* Pet. App. 24; No. 279 Video 11:14:30; No. 284 Video 12:17:11; No. 286 Video 12:17:53. As compared to the maneuver designed to stop the car in *Scott*, the police action in this case is virtually the action that the *Scott* Court described as imposing "the near *certainty* of death": "pulling alongside a fleeing motorist's car and shooting the motorist." *Scott*, 550 U.S. at 384. Indeed, the gunshot wounds were entirely the cause of Rickard's death, and partially the cause of Allen's. *See* Pet. App. 24; J.A. 60-61, 76-77.

In short, in *Scott*, the Court found it constitutional for the police to have used a maneuver to try to stop a car, with a lone occupant (the driver), that was actively fleeing in a high-speed chase. While the maneuver subjected the car's occupant to a high likelihood of serious injury or death, it did not, as the Court in *Scott* emphasized, give rise to "near *certainty* of death."

In this case, in contrast, the police shot at the driver of a car, and also at the passenger, all at a juncture when the car was not actively engaged in a high-speed chase. Further, as compared to the maneuver meant to stop the car in *Scott*, the police action in the case, under *Scott*'s own language, gave rise to "the near *certainty* of death."

For these reasons, it cannot be said, as a matter of law, that the police action was objectively reasonable based on the risk analysis framework set out in *Scott*. As a consequence, *amicus* respectfully submits that, should this Court consider the matter, the portion of the decision of the United States Court of Appeals for the Sixth Circuit on this point should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the portion of the judgment of the court below that affirmed the conclusion that the police action was objectively reasonable as a matter of law.[9]

Respectfully submitted,

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February 4, 2014

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[9] *Amicus* makes no argument with respect to the first question presented to the Court, and on the second question makes no argument as to whether the constitutional right at issue was clearly established.

AMICUS CURIAE BRIEF

No. 12-1117

In the
Supreme Court of the United States

OFFICER VANCE PLUMHOFF, *et al.*,
Petitioners,

v.

WHITNE RICKARD, A Minor Child, *etc.*,
Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

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This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as amicus curiae in support of respondent.

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel.

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[1] Pursuant to this Supreme Court Rule 37.3(a), the parties have consented to the filing of this brief. Amicus affirms, pursuant to Rule 37.6, that no counsel for any party authored this brief in any manner, and no one, other than amicus, made a monetary contribution to the preparation or submission of this brief.

NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the individual liberties guaranteed by the Fourth Amendment. In the furtherance of this and its other objectives, the NACDL files approximately 50 amicus curiae briefs each year, in this Court and others, addressing a wide variety of criminal justice issues. NACDL has a particular interest in this case because the decision of the court below raises important issues regarding the scope of the protections of the Fourth Amendment.

SUMMARY OF ARGUMENT

If this Court concludes that the court of appeals failed to determine whether the actions of the petitioners in 2004 violated then clearly established law, it should remand the case to the court of appeals with instruction to do so in the first instance. This case presents a substantial number of distinct constitutional claims involving multiple defendants and numerous disputed questions of fact. This Court should not, without benefit of a thorough analysis by the lower courts, undertake to resolve whether the relevant law was clearly established in 2004.

For similar reasons, if the Court decides to remand this case to permit the court of appeals to decide whether the asserted constitutional rights were clearly established at the time of the shootings, the Court should not attempt to resolve all the constitutional questions posed by this case.

Under *Tennessee v. Garner* only a current significant threat of death or serious injury can justify the use of deadly force. It was clearly established in 2004 that such force could no longer be utilized once a threat had ended. The petitioners may not justify their use of force on asserted dangers than had ended before the shots were fired.

Petitioners argue that Rickard's driving was "a danger to himself" and "posed a threat" to his passenger. Neither circumstance, if present, would warrant killing Rickard (to protect him from injury in a car crash) or using force virtually certain to kill his passenger.

The courts below properly identified several material disputed facts underlying petitioners' claim of qualified immunity. The video recordings do not demonstrate that Rickard attempted to ram police cars on the highway, or that he succeeded in doing so in the parking lot. Petitioners cannot rely on their own affidavits to establish the existence of undisputed facts supporting summary judgment. Because the petitioners are interested parties, a jury would not be required to believe their testimony. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

The United States contends that "the video makes clear" that Rickard's car was being operated in the parking lot "in a dangerous manner." That assertion is at odds with footnote one of the government's brief, which does not challenge the district court's conclusion that the video was inconclusive at best. The "maneuvers" on which the government

apparently relies occurred *after* the police began shooting at Rickard, not before.

The United States contends that the use of lethal force was justified because Rickard had led a "high-speed" chase. But the record does not contain conclusive evidence regarding the speed of Rickard's car. A police affidavit asserts only that Rickard was going "at least 75 [m.p.h.]" on I-40. The speed limit on that interstate highway is 70 miles per hour.

ARGUMENT

I. If the Court of Appeals Failed to Determine Whether Petitioners Conduct Violated Rickard's Clearly Established Constitutional Rights, This Court Should Remand the Case to the Court of Appeals With Instructions to Do So

Petitioners and the Solicitor General contend that the court of appeals erred in failing to determine the state of the law at the time the incident occurred. Pet. Br. 13-14; U.S. Br. 13. The Solicitor General suggests that if the Court finds that the court of appeals erred in this manner, it should "remand for the court of appeals to conduct the qualified-immunity analysis in the first instance." U.S. Br. 12. With respect to that issue, we agree with the Solicitor General. If the Court concludes that the court of appeals failed to determine the state of the law in 2004, the Court should decline to answer the qualified immunity question in the first instance, and should instead remand the case to the lower court.

The Court does not normally decide issues that were not resolved below. *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999). When the Court concludes that a lower court erred in one respect, and resolution of the case turns on other issues that the lower court did not address, the Court typically remands for resolution of the unresolved issues.

Nothing in the procedural posture of this case warrants departing from the Court's usual practice of remanding a case in such circumstances. To the contrary, the case presents an unusually complex controversy, which would entangle the Court in a number of factbound and subsidiary questions. *See Douglas v. Indep. Living Ctr. of S. California, Inc.*, -- U.S. –, –, 132 S. Ct. 1204, 1211 (2012) ("Given the complexity of these cases, rather than ordering reargument, we vacate the Ninth Circuit's judgments and remand the cases, thereby permitting the parties to argue the matter before that Circuit in the first instance.").

In order to address the qualified immunity issues raised by this case, the Court would first have to compare the conflicting accounts of the plaintiff and defendants and evaluate their differences in light of the substantial record, a process that would involve carefully reviewing the three video recordings. The district court concluded that in several important respects the recordings do not support, conclusively or perhaps at all, the defendants' version of the facts. The United States understandably declines to

attempt to resolve these disagreements. U.S. Br. 19-20 n.1.

The Court would then have to assess the differences between the knowledge, and actions, of the multiple defendants. With regard to the chase on I-40, some officers could see what Rickard was doing, while others could not; who could see what is not always clear. Several officers made statements on the radio about what was going on; which other officers heard those statements is not apparent from the record. J.A. 216, 222 It would be necessary to determine whether these radio broadcasts could be relied on by other officers. *See* U.S. Br. 32-33. During the events in the parking lot immediately preceding the shooting of Rickard and Allen, the individual defendants were at various locations, and could have perceived the developments differently. For example, officer Galteli stated that at the time he mistakenly believed that the first shots—which were actually fired by officer Plumhoff --had been fired by Rickard. J.A. 216. These differences in what each officer knew would bear on whether he was entitled to qualified immunity.

The 15 bullets were fired over a period of time under varying circumstances; those differences may well be relevant to whether the shooter would be entitled to qualified immunity.[2] Some shots were fired while Rickard was moving alongside officer

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[2] *See Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) (stating that the appropriate method of analysis is to "carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage").

Plumhoff, or in the direction of officer Ellis, while other bullets were fired after Rickard was moving away from (and thus assuredly not endangering) all the officers.[3] J.A. 165-66, 211. Some shots were fired through the passenger window, posing a particular danger to Allen, while others were fired at the moving car from a sufficient distance that accurate aim would have been difficult. While in most instances the officers held their guns at eye level and could aim them at Rickard, the first shots were fired by Plumhoff when he was standing close to the passenger side of the car, and presumably could not have actually seen Rickard when he fired. Thus, in addition to any differences deriving from variations in what particular officers knew, qualified immunity might to some degree have to be assessed on a bullet-by-bullet basis.

That analysis would be further complicated by the fact that the petitioners have adduced a number of distinct justifications for their actions, which to some extent have evolved over the course of the litigation. The United States presents yet additional fact-bound theories as to why the petitioners should be accorded qualified immunity. Each of these different arguments would have to be considered separately as to each of the defendants, and perhaps as to each bullet.

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[3] *See Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993)("When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity.").

Finally, it would be necessary to assess the numerous issues thus identified in light of what law was clearly established in 2004 in the Sixth and Eighth Circuits, and to decide—to the extent that those circuits' case law differed—which circuit's law would be controlling.[4]

It would be inappropriate for this Court to attempt all of this without the benefit of such a particularized analysis by the court of appeals. In the past, the Court has expressed reluctance to address a question "without the benefit of a thorough lower court opinion." *Zivotofsky ex rel. Zivotofsky v. Clinton*, -- U.S. --, 132 S. Ct. 1421, 1430 (2012). If, after the lower courts decide these issues on remand a party seeks review by this Court, the issues presented will be cleaner and in all likelihood considerably narrowed and more focused.

II. If the Court Remands the Qualified Immunity Issues, It Should Not Reach the Constitutional Questions

The Solicitor General suggests that if the Court decides that the qualified immunity questions should be considered in first instance by the court of appeals, "the better course in this case is to decline to reach the constitutional question...." U.S. Br. 31; see Resp. Br. 3. We agree.

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[4] *See Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012); *see also* U.S. Br. 25.

Unlike *Scott v. Harris*, 550 U.S. 372 (2007), which involved only a single officer, act, and constitutional question, this case presents a multiplicity of officers, actions, and distinct constitutional questions. All of those questions would have to be resolved before the Court could conclude, as it did in *Scott*, that no violation had occurred.

In light of the unresolved factual disputes in this case, any issues addressed by this Court would have an unavoidable hypothetical quality. The Court would be undertaking to decide whether constitutional violations would be presented by a case in which all of those disputes were resolved in favor of the plaintiff. Were the case to proceed to trial, the jury's findings of fact might present a far different set of constitutional questions. To the extent that petitioners rely on the speed of the chase that occurred on I-40, the Court's task at this juncture would be confounded by that fact that the record contains little evidence, and nothing conclusive, about how fast Rickard was driving.

Because of the unresolved factual issues, the justification for the shooting of Rickard and Allen would have to rest exclusively on the speed with which Rickard drove during the car on I-40. That would present a constitutional issue that is fairly uncommon. In virtually all the lower court decisions involving firing at fleeing motorists, the drivers have taken some other, more dangerous actions that posed a distinct and graver risk of harm to others.

The circumstances of this case are also idiosyncratic because the officers fired at a car in

which there was an innocent passenger, and did so in a manner that virtually assured that the passenger would be killed, as indeed she was. Plaintiff argues that this circumstance weighs heavily against the reasonableness of the actions of the defendant officers, several of whom were subsequently indicted for killing Allen. Because it is virtually unheard of for law enforcement officers to direct a fusillade of bullets at a moving car with an innocent passenger, this issue—whatever its merits—is unlikely to arise with any frequency.

III. A Number of Proffered Justifications Are Inconsistent With Clearly Established Law in 2004

1. Petitioners repeatedly rely on events that had ended before lethal force (or much of it) was used. Pet. Br. 3, 21-22, 27. But, as this Court held in *Tennessee v. Garner*, 471 U.S. 1 (1985), it is the current existence of once the threat of danger to officers or others, not a past threat, that alone justifies the use of deadly force. 471 U.S. at 3 (deadly force may be employed when "officer has probable cause to believe that the suspect *poses* a significant threat of death or serious physical injury to the officer or others") (emphasis added); *id.* at 11 ("Where the suspect *poses* no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.") (emphasis added). *Scott v. Harris*, 550 U.S. 372, 386 (2007), held that a "police officer's attempt to *terminate* a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth

Amendment, even when it places the fleeing motorist at risk of serious injury or death." (emphasis added).

Prior to 2004, several circuits had held—and no circuit had ruled to the contrary—that when the threat to officers or the public ends, so too does the justification for employing deadly force.[5] In *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992), for example, police officers twice fired at a mentally ill individual when he charged the officers with a knife. The assailant retreated to another part of the building, and ten minutes later again approached the officers, this time without the weapon. The police fired again, killing him. The court of appeals noted that it had clearly established that a "person has a right not to be shot unless he is perceived to pose a threat to the pursuing officers or others." *Id.* at 1045 (*citing Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir.1988)). The court then found that plaintiffs raised "a genuine issue of fact as to whether, in the [later] . . . round of discharges of the officers' revolvers, the officers may have shot Bubenhofer

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[5] *E.g.*, *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) ("A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect."); *Wynalda*, 999 F.2d at 247 ("When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity."); *Hopkins v. Andaya*, 958 F.2d 881, 887 (9th Cir. 1992) (dividing shooting into two segments and holding that even if the use of deadly force was justified initially, "the exigency of the situation lessened dramatically" and the second use of deadly force was unreasonable).

even though he posed no serious threat of physical harm." *Id.*[6]

Petitioners appear to acknowledge that under clearly established law when a threat ends, the need for deadly force ends as well. *See* Pet. Br. 28 ("Rather, the circuit courts have held [prior to 2004] that where deadly force is constitutionally permissible, it remains permissible until the threat is eliminated; that is, officers can continue using such force *during the pendency of a threat.*") (emphasis added).

Petitioners nevertheless contend that "the use of deadly force" was needed "to end this high-speed chase" on the highway because it endangered the public. Pet. Br. 3.[7] Petitioners also argue that

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[6] Post-2004 decisions have repeatedly reached the same conclusion. *E.g.*, *Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 413 (5th Cir. 2009) ("But an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased."); *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) ("We therefore hold that force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated."); *Lamont v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011) ("Even where an officer is initially justified in using force, he may not continue to use such force after it has become evident that the threat justifying the force has vanished.").

[7] *See also* Pet. Br. 4 ("When properly applied, are entitled to qualified immunity because it was not beyond debate in July of 2004 that their use of deadly force to *end* the threat posed during this dangerous high-speed police chase violated a clearly established constitutional rule.") (emphasis added); Pet. Br. 3, 21-22, 27.

deadly force was needed to end the highway high-speed chase because officers were in danger when they tried to keep up with Rickard. *See* Pet. Br. 4 ("jeopardizing the safety" of "the officers in the pursuit"), 15. It is undisputed, however, that at the time the officers fired on the vehicle, Rickard had voluntarily left the highway and the highway chase had ended. *See* U.S. Br. 24 (noting that "the deadly force here was used during a period in which Rickard was not driving at high speeds").

Petitioners argue that the use of deadly force was justified because Rickard posed a threat to the safety of the officers standing near his car in the lot. *See* Pet. Br. 10. Officer Gardner claimed that he fired his weapon because the vehicle posed "a danger to the safety of police officers" J.A. 223-24. And officer Galtelli stated that he fired his weapon because of the threat to his own safety. J.A. 216-17, 217. The videotape, however, indisputably shows that at the moment officers Gardner and Galtelli fired their weapons, Rickard's vehicle was moving away from them. *See* U.S. Br. 5 (citing to the videotape and stating that Rickard's vehicle was moving away from the officers when Gardner and Galtelli fired 12 total shots into Rickard's vehicle).[8] Assuming arguendo that Rickard's car presented a threat to the safety of officer Plumoff who fired when the car was next to him, and regardless of whether the other officers had reason to be fearful before Rickard backed away from them, by the time Gardner and Galtelli began firing, those threats had ended.

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[8] No. 279 Video 11:14:29; No. 279 Video 11:14:30; No. 284 Video 12:17:10; No. 284 Video 12:17:11; Pet. App. 24.

2. Petitioners argue that Rickard's driving endangered Rickard himself, and that they fired at Rickard to protect him from injuring himself in a crash. Pet. Br. 14 ("It was objectively reasonable for defendant to conclude that Rickard was a danger to himself."); Pet. Br. 25 ("Rickard was a danger to himself"). But no reasonable officer could have believed that it was reasonable to kill Rickard in order to save him from the "danger to himself" posed by his own driving.[9] Such a practice is so clearly unconstitutional that it need not have been decided in a similar case to give officers clear warning that their actions were in violation of the law. *See United States v. Lanier*, 520 U.S. 259, 271 (1997) ("The easiest cases don't even arise. There has never been ... a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.") (citations omitted).

3. Petitioners argue that the use of deadly force was justified as a means to protect Rickard's passenger, Kelly Allen. Pet. Br. 14 ("It was objectively reasonable for defendants to conclude that Rickard was a danger to ... his passenger."); Pet. Br. 25 (Rickard "continued to pose a threat of serious

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[9] *See Mercado v. City of Orlando*, 407 F.3d 1152, 1157 (11th Cir. 2005) (finding officer's actions in shooting a non-dangerous suicidal suspect in the head with a Sage Launcher, which caused permanent brain damage, were clearly an unreasonable response to the suspect's threat of pointing a knife at his own heart).

physical injury or death to ... his passenger."). Assuming arguendo that Rickard was indeed driving in a manner that "pose[d] a threat of serious physical injury or death to . . . his passenger," the type of force used by the police was clearly unreasonable. The police did not use a type of force calculated to disable without injuring Allen. To the contrary, the police resorted to a level of force that was virtually certain to, and indeed did, kill Allen herself. The officers fired 15 bullets into the car, three from Allen's side of the car, and others at the moving car as it drove at increasing distance away from the shooters. Because they continued to fire as the car picked up speed, it was highly likely that Allen would be killed or injured if the bullets disabled Rickard and the car crashed. The autopsy on Allen confirmed that either the bullet that struck her in the head, or the crash of the car, would have resulted in her death. Pet. App. 24; J.A. 60-61, 76-77 (autopsy reports). No officer could believe that it would be reasonable to take steps virtually guaranteed Allen's death in order to protect her from a "threat of serious physical injury or death."

4. Petitioners argue that the use of deadly force was justified because officers were subjectively afraid when they fired. Pet. Br. 9-10. But it was clearly established law prior to 2004 that only objective conditions, not the subjective motivations or fears of law enforcement officers, "bear[] on whether a particular seizure is unreasonable under the Fourth Amendment." *See Graham v. Connor*, 490 U.S. 386, 397 (1990). Similarly, the availability of qualified immunity depends on objective factors; what the

officers subjectively believed is "irrelevant." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

IV. A NUMBER OF THE JUSTIFICATIONS PROFFERED BY PETITIONERS REST ON DISPUTED FACTS

1. The courts below concluded that summary judgment was inappropriate in this case because there were disputed issues of material fact. Pet. App. 10, 36, 38, 40. Petitioners make no effort to address what factual issues may or may not be disputed. Petitioners instead assert that "the court of appeals fail[ed] to note any disputed material facts in its opinion." Pet. Br. 16; *see id.* at 13 "[w]hile the court of appeals suggested that factual disputes existed, it failed to say what they were"). That is incorrect. First, the Sixth Circuit pointed out that the district court had identified a number of specific facts that were in dispute, and accepted the trial court's assessment of those disputes.[10] The district court had identified three such material factual disputes, and

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[10] Pet. App. 10 n.3 ("The district court made a number . . . of findings as to disputed issues of fact, which we do not repeat here, and which we cannot say were 'blatantly and demonstrably false.'"); see *id.* at 8.

In light of *Johnson v. Jones*, 515 U.S. 304 (2005), where a district court has concluded that a claim of qualified immunity turns on disputed issues of fact, the Sixth Circuit will overturn that district conclusion only when "'the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false.'" Pet. App. 8 (quoting *Moldowan v. City of Warren*, 578 F.3d 351, 370 (6th Cir. 2009)). Because the district court determinations with regard to the three identified disputes in this case were clearly correct, this Court need not determine what standard of review governs such determinations.

the court of appeals quoted two of those determinations. Pet. App. 4-5. Second, the court of appeals specifically explained that the video recordings on which defendants relied failed to resolve questions about "the degree of danger that the officers were placed in as a result of Richard's alleged conduct." Pet. App. 10; see *id.* at 9. Under these circumstances it was clearly incumbent upon to address whether the issues identified by the district court were disputed and material.

2. Although the procedures governing litigation of qualified immunity are in certain respects different than those applicable to most other issues, a motion for summary judgment based on qualified immunity must satisfy the usual standard established by Rule 56 of the Federal Rules of Civil Procedure. Summary judgment can be granted only "if the movant shows that there is no genuine dispute as to any material fact...." Fed. R. Civ. P. 56(a).

> [When a] case [is] decided on summary judgment, there have not yet been factual findings by a judge or jury . . . . When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (*per curiam*). . . . In qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts.

Scott v. Harris, 550 U.S. 372, 378 (2007).

A movant can meet the Rule 56 standard by showing that there are no disputes of fact at all, that any disputes of fact are not material, or that the evidence regarding a disputed issue of material fact is so conclusive that no reasonable jury could resolve that dispute in favor of the non-moving party. Although summary judgment regarding a dispute regarding material fact can be based on a video recording of the events in question, the standard for doing so is a demanding one. The unusual videotape in *Scott* provided a basis for summary judgment because it "quite clearly contradict[ed] the version of the story told by [the plaintiff]." 550 U.S. at 378.

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. . . . Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him.

550 U.S. at 380. But where reasonable viewers could disagree about what is depicted on a videotape, or about the inferences to be drawn from those events, the recording does not conclusively resolve the underlying dispute. Like any other type of evidence, a videotape must do more than provide support, even strong support, for the contention of the moving party; a video recording must, even when looked at in the light most favorable to the non-moving party, "utterly discredit" that party's contention. If

"reasonable minds could differ as to the import of the evidence," that evidence would not support an award of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

This Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), limits the extent to which a party seeking summary judgment regarding a disputed issue of material fact may rely on depositions or affidavits. *Reeves* held in the context of a post-trial motion for judgment as a matter of law that the court "must disregard all evidence favorable to the moving party that the jury is not required to believe." 530 U.S. at 151. "The court may only give credence to . . . 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.* (quoting 9A c. Wright & A. Miller, Federal Practice and Procedure, § 2529, 299 (2d ed. 1995)). That same limitation applies to the materials that may be relied on to obtain summary judgment. The standard for summary judgment under Rule 56 is "very close" to the Rule 50 directed verdict standard, the key difference being "procedural." *Liberty Lobby, Inc.*, 477 U.S. at 251 ("'... summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.'") (internal citation omitted).

The limitation in *Reeves* is of particular importance where, as here, the only witnesses other than the moving party who would have had personal

knowledge of the material issue in question have died at the hands of the moving party. In that situation, although the non-moving party might have little or no direct evidence of its own that contradicted the evidence of the moving party, a jury assuredly would not be "required to believe" the account of the moving, and undeniably interested, party. Of course, at trial a jury would be free to credit the testimony of the moving party, but no court would instruct a jury that it was obligated to do so. The brief for respondent challenges the affidavits and deposition statements of the defendants by arguing that those statements are inconsistent or ambiguous. But even if the testimonial evidence proffered by a moving party is completely consistent and entirely without ambiguity, a jury would not be "required to believe" that evidence if the statements came from interested witnesses.

In the instant case, the petitioners offered in support of their summary judgment motion two quite different types of evidence. First, they relied on affidavits and deposition testimony from the petitioners themselves. Second, they put in the record three video recordings of all or part of the events leading to Rickard's death. Because the petitioners themselves were necessarily interested parties, the district judge properly limited its inquiry to whether the video recordings, like the recording in *Scott v. Harris*, "quite clearly contradict the version of [the events urged by plaintiffs]." 550 U.S. at 378.

3. In the district court petitioners asserted that during the chase on I-40 Rickard repeatedly

attempted to ram the cars of the police officers. Correctly restricting his inquiry to whether the video tapes themselves provided conclusive evidence of such assaults, the district judge concluded the tapes did not. "Although the Rickard vehicle and the officers were engaging in a high-speed chase, the video of the pursuit does not show any assaults, but only the Rickard vehicle changing lanes. It is difficult to determine the exact proximity of the vehicles during the case. The . . . videos of the chase[] would not support a reasonable person in concluding that there were aggravated assaults." Pet. App. 36. The videos are inconclusive, in part, because the cars of officer Plumhoff, (who was leading the chase) and officer Evans had no video recorders, and the recorder in officer Gardner's car did not work. Pet. App. 20-21.[11]

In this Court petitioners assert repeatedly that Rickard attempted to ram the police cars while they were on the highway. Petitioners do not, however, contend that the video recordings themselves depict such events. Rather, petitioners argue that "[i]n deposition and affidavit testimony, the officers described what appeared to them to be Rickard attempting to veer or ram his car into Plumhoff's and Evans's police cars . . . . (J.A. 176-77[Plumhoff

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11 *See* Pet. App 21-22 ("Whether there were in fact felony charges at this point is disputed. . . . That activity is not clearly depicted on the video and is disputed."), 38 ("The videotape here shows only that the vehicles were changing lanes and swerving through traffic. Based on that evidence, the Court concludes that the officer's perception that they were the victims of assault was not objectively reasonable.").

affidavit], 228 [Evans affidavit], 234 [same])." (Pet. Br. 7). But because Plumhoff and Evans are petitioners, and thus interested parties, the jury would not be required to believe their testimony, and it cannot be relied upon to demonstrate that there is conclusive evidence regarding that issue. Petitioners also point to the fact that during the chase Plumhoff and Evans reported on their radios that Rickard had acted in that manner; but the recording only conclusively establishes that the reports were made over the radio, not that the reports were accurate (or necessarily believed by the officers). Of course, at trial a jury might chose to find the radio reports significant evidence supporting the officer's testimony, but it would not be required to do so. The radio recordings alone are assuredly not conclusive; indeed, at least unless merely intended to corroborate trial testimony by the two officers, the recordings themselves would be inadmissible hearsay if offered to prove the truth of their contents.

In the district court the petitioners contended that Rickard, after leaving the highway, intentionally drove into a head-on collision with officer Plumhoff's car, and that court understood the petitioners to argue as well that Rickard's car spun out after he deliberately hit officer Evans' car. Neither Plumhoff's car nor Evans' car had video recorders, and the district judge thus concluded that the circumstances of those collisions were disputed issues. "Defendants . . . argue that Rickard posed an immediate threat because he intentionally rammed two police vehicles in Memphis. . . . Whether the Rickard vehicle intentionally collided with the vehicles or collided with the Plumhoff vehicle as a result of momentum

from an unintentional collision with the Evans vehicle is a disputed issue of material fact. As such, it cannot serve as the foundation for concluding that the officers' conduct was objectively reasonable."[12] Pet. App. 38; *see* Pet. App 4 (quoting district court)). In this Court, petitioners appear to have abandoned the contention that the collision with Plumhoff's or Evans' cars were deliberate acts on Rickard's part. They refer to the collision with Plumhoff without asserting that Rickard intended that collision, or was in control of his car, when it occurred[13], and they note that Evans was following Rickard when their cars collided.[14]

The district court also concluded that there was a material dispute of fact as to whether Rickard was "revving" his car engine when (or immediately before) the officers began firing. In the lower court the petitioners relied heavily on their contention that Rickard was doing so, apparently on the theory that by gunning his engine Rickard was indicating an intent to accelerate in the direction of the officers. The trial judge concluded that the video recording, although depicting this period of time, was not

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12 "Defendants assert that the Rickard vehicle then turned directly toward Plumhoff's vehicle and had a head-on collision with it. Plaintiffs dispute these statements and aver that the Rickard vehicle was still moving forward after contact with Evans' vehicle and that this momentum caused the collision with Plumhoff's vehicle." Pet. App. 22-23.

13 Pet. Br. 8 ("Rickard collided head-on with Plumhoff's cruiser"), 27 ("collided with police vehicles"), 37 ("there was a collision between Rickard and Plumhoff's cars, and Rickard spun out").

14 Pet. Br. 8 ("Rickard was hit by a pursuing vehicle.").

sufficiently clear to establish the correctness of this contention. "Defendants assert that [Rickard's] vehicle engine was 'revving,' but Plaintiffs dispute this and state that the vehicle was rocking back and forth, and it is unclear whether the engine noise in conjunction with this rocking motion should be characterized as revving the engine." Pet. App 23; *see* Pet. App. 5 (quoting district court)).[15] Petitioners no longer refer to this "revving" theory, which they apparently have abandoned.

In this Court, rely on a different account of what occurred after Rickard's car spun out onto the parking lot. Earlier, in their briefs in the court of appeals, petitioners described Rickard's car as merely "rocking back and forth against the front of Gardner's car as its tires squealed/spun." Defendants-Appellants' Brief, 5.[16] The phrase "rocking back and forth" suggests that the motion was the incidental effect of the failure of the tires on Rickard's car to get enough traction to move the car in one direction. But in this Court petitioners advance a far more threatening account of what occurred, describing Rickard as having "accelerated" and deliberately and repeatedly "ramming" into Gardner's car. (Pet. Br. 3, 9, 27, 32, 37, 39). That suggests that Rickard drove deliberately and with considerable force into Gardner's car, backed away,

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15 "Although the . . . Defendants contend that the car was 'revving' when the first shots were fired, that is a disputed issue." Pet. App. 40.

16 See Defendants-Appellants' Reply Brief, 2 ("The video . . . reveals that Rickard's car's tires were spinning freely and rocking against one of the police cars.").

and then did the same thing several more times.[17] The video recording of these events, however, does not support petitioners' current account; rather, they show Rickard's car, as petitioners asserted below, merely rocking back and forth, as he attempts, initially without success, to back up, touching Gardner's car only incidentally with no acceleration in the direction of that car or without any other indication of an intent on Rickard's part to hit the officer's vehicle.

Petitioners offer two justifications for the use of force based on what occurred when Rickard, subsequent to his contact (of whatever nature) with the Gardner car had ended, was backing out of the parking lot. Petitioners assert that Rickard's car hit Evans on the hand[18], and that Ellis was forced "to step to his right"[19] to avoid being struck by Rickard's car. The first contention rests solely on Evans' deposition; because a jury would not be required to believe the assertion that Rickard actually injured Evans, that assertion cannot support summary judgment. Ellis can be seen on the video stepping to one side as Rickard backs out of the lot, but both Ellis and the car are moving slowly. Petitioners do not contend that Rickard was trying to hit Evans, or

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17 *See* Pet. Br. at 3 ("Three of the officers used deadly force only after Rickard repeatedly rammed a police car in front of him and then drove in reverse in the direction of officers on foot trying to arrest him."). This suggests that Rickard was deliberately (and repeatedly) driving forward when he hits Gardner's car.

18 Pet. Br. 10 (citing J.A. 229 and 234).

19 Pet. Br. 10; see *id.* at I, 27, 37, 39.

even that Rickard knew that Ellis was standing behind his car. No less importantly, both of these events occurred *after* the shooting began; the officers began firing before Rickard began to back away from Gardner's car. [20] Actions taken by Rickard after the shooting began obviously cannot provide a justification for the first volley of shots that occurred at an earlier point in time. In the district court, petitioners argued that once the officers began to fire at Rickard at close range, it was an "astonishing act of defiance" on the part of Rickard to attempt to drive away from the officers who were shooting at him.[21] But surely any sensible adult would flee from gunmen—police officers or not—who were trying to kill him.

4. Although the petition in this case insisted the circumstances here are indistinguishable from those in *Scott v. Harris*, the differences are palpable. Harris was driving on a two-lane winding country road, with oncoming traffic and possible pedestrians at risk. Rickard was on a divided, six lane interstate highway; there was no oncoming traffic and no pedestrians. Harris deliberately drove into the oncoming lane; Rickard did not, and could not have done so. Harris, but not Rickard, ran through several red lights. Harris was driving 85 m.p.h. on a road with a 55 m.p.h. speed limit; at that speed he was at

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20 Pet. Br. 9 ("[i]mmediately after the Honda began ramming Gardner's patrol unit, Plumhoff fired three rounds at the driver"), 32 ("While at the time of the first three shots in this case, Rickard was not covering much ground in the Honda, he was using it to ram Officer Gardner's car.").

21 Defendants' Statement of Undisputed Material Facts, 13.

great risk of losing control of his car when rounding curves, and had to move into oncoming traffic whenever he wanted to pass a car going the speed limit. In the instant case the only affidavit regarding Rickard's speed states it was "at least 75 m.p.h." J.A. 353. The speed limit on I-40 is 70 m.p.h.[22], and like all interstate highways it is curved and banked in a manner to permit cars to drive with safety at speeds that would be dangerous on a windy country road. For a number of years in past decades, several western states had substantially higher speed limits on roads of similar design.

Element	Scott Harris v. Timothy Chase	Plumhoff v. Richard Chase
Passenger	No	Yes
Rate of speed	85 m.p.h. in 55 m.p.h. zone	"At least 75" in 70 m.p.h. zone
Number of lanes	2 lanes	6 lanes
Divided lanes	No	Yes
Oncoming traffic	Yes	No (divided)
Ran red lights	Yes (2)	No

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22 *See* Governors Highway Safety Association, Survey of the States: Speeding, United States Department of Transportation Federal Highway Administration (2005), http://safety.fhwa.dot.gov/speedmgt/ref_mats/fhwasa09028/resources/surveystates_speeding.pdf.

Pedestrians nearby	Yes	No
Forced cars to pull over	Yes	Disputed
Winding road	Yes	No
Type of force used	P.I.T. maneuver on clear road	15 bullets

V. The Government Does Not Advance a Sound Basis for Concluding That the Defendants Are Entitled to Qualified Immunity

The United States does not rely on the disputed facts that are the bases for the defendants' argument for qualified immunity. The government specifically takes no position as to whether the video recording demonstrates that while in the lot Rickard "posed an immediate threat to the safety of the officers." U.S. Br. 20-21 n.1. It merely notes that there is a dispute as to whether Rickard intentionally rammed Plumhoff's car. U.S. Br. 4. The government's brief observe that several officers reported on the radio that Rickard had attempted to collide with them on the highway, but does not assert Rickard actually attempted to do so. U.S. Br. 3-4. And the United States does not even mention the defendants' contention that Rickard repeatedly accelerated and rammed Gardner's car in the parking lot; to the contrary, the government's brief describes the video as revealing only that Rickard's vehicle "moved slightly forward into officer Garner's vehicle." U.S. Br. 4.

The Solicitor General contends, however, that the limited facts that are undisputed are sufficient to demonstrate that the defendants are entitled to qualified immunity.

1. The government relies, first, on a repeated assertion that "the video makes clear" (U.S. Br. 21) that during the time Rickard's car was in the parking lot he operated it "recklessly" (U.S. Br. I, 11, 12, 21, 30) or "in a dangerous manner." (*Id.* 21, 26; *see id.* 27 ("attempted dangerously to evade apprehension after being cornered")). The Solicitor General's assertion that Rickard was operating the car in the parking lot in a "dangerous manner" is inconsistent with footnote 1 of the government's brief, which expressly does not challenge the district court's conclusion that there is a genuine dispute of material fact as to whether Rickard posed a danger to the officers. U.S. Br. 19-20 n.1.

In seven of these passages, the government's brief simply does not explain what actions by Rickard constituted that assertedly reckless or dangerous conduct. Such a conclusory assertion, without more, is insufficient to support a claim of qualified immunity. In one passage the government does offer an explanation of this contention.

> The video evidence demonstrates . . . that Rickard was operating the vehicle in a reckless manner during his close-quarters encounter with the police, in which he made a series of sudden maneuvers with the car despite the fact

> that the officers were standing only steps away and ordering him to stop.

U.S. Br. 19.

The first "maneuver" that is visible in the video recordings is that Rickard backed away from most of the officers. Although one officer (Plumhoff) was beside the car, Rickard drove straight back. Another officer (Ellis) was behind the car, but Rickard drove sufficiently slowly that Ellis said he "moved out of the way" avoid the car. J.A. 211. The car does not appear to be moving at any great speed, as Ellis's response confirms. What is visible on the recording does not conclusively demonstrate dangerous behavior.

The other "maneuver" that occurred when, having backed away from the officers, Rickard put his car in drive and drove out of the lot. Although the officers may have at that point been "only steps away," they were behind Rickard and he was driving away from them. Obviously that maneuver posed no danger to the officers; whether Rickard changed gears or drove away "suddenly" is not apparent on the recording.

Even if Rickard's actions in backing away from the officers, or in driving out of the lot, could be characterized as reckless or even dangerous, those maneuvers occurred *after* the police began firing at Rickard. The government repeatedly describes the sequence of events as though the officers did not fire at Rickard until after (and because) he had backed away, turned his car, and was driving away—the

asserted "sudden maneuvers." "[P]etitioners used deadly force to terminate th[e] chase *after* Rickard operated the vehicle in a reckless manner in an attempt to escape." (Emphasis added).[23] Most of the bullets, however, were actually fired before the point in time when the "maneuver[s]" relied on by the government occurred.

2. The government suggests that a reasonable officer could believe that the use of lethal force was warranted because, before Rickard left the highway, he was driving at "high-speed." (U.S. Br. 11, 12, 19, 20, 21, 26, 30). But the United States advances no contention regarding either the actual speed of

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[23] U.S. Br. I ("question presented is whether are entitled to qualified immunity where police officers "use deadly force to prevent a suspect who . . . *has operated* a vehicle recklessly during a close-quarters encounter from resuming his vehicular flight")(emphasis added), 11 ("the question here is whether in 2004 it was clearly established that the police may not use deadly force to prevent a misdemeanant . . . from resuming a dangerous, high-speed chase . . . *after* the driver *had recklessly* operated the vehicle . . . in a close-quarters encounter with police")(emphasis added), 12 ("[i]n 2004, it was not clearly established that a police officer may not use deadly force to prevent a suspect who . . . *operated* his vehicle recklessly during a close-quarters encounter from resuming his vehicular flight")(emphasis added), 19 ("the qualified-immunity question is whether a police officer may shot a motorist who . . . once cornered, operates a vehicle in a dangerous manner in an attempt to evade capture and resume his flight")(footnote omitted), 26 ("[a] reasonable officer canvassing Sixth Circuit precedent in 2004 would not have had clear notice that the Fourth Amendment prohibits the use of deadly force to prevent a person who has just . . . *operated* a vehicle in a dangerous manner once stopped, from returning to the public roads")(emphasis added).

Rickard's car or the speed limit on I-40. On an interstate highway, cars driving at or even below the posted speed limit would normally be described as moving at a high speed. There could of course be cases in which a car's speed was so great, in the context of the circumstances in which the car was being driven, that the speed alone posed a sufficiently real threat of harm to bystanders or pursuing police as to arguably meet the standard in *Tennessee v. Garner*, 471 U.S. 1 (1985). But a party asserting a claim of qualified immunity must establish the speed with which a car was traveling, and articulate why—on the road and in the circumstances at issue—it presented such a danger.[24] The United States does neither.

The United States also asserts that the manner in which Rickard was driving his car on I-40 was "dangerous." U.S. Br. 11, 12, 20, 26. But the meaning of this contention is unclear. Perhaps the government contends that the speed of Rickard's car alone was sufficient to endanger others, but such a contention cannot succeed when the government takes no position as to how fast Rickard's car was traveling, or why that speed would be dangerous on a divided interstate highway expressly designed for high speeds. Perhaps the government credits the

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[24] The United States sought to do so in its brief in *Scott v. Harris*. "It is undisputed that the officers observed respondent driving at least 90 miles per hour in a 55 mile-per-hour zone . . . . [H]e . . . presented a serious risk to other vehicles or pedestrians, because anyone driving 90 miles per hour can lose control at any moment and does not have sufficient time to react to unpredictable events." Brief for the United States as Amicus Curiae Supporting Petitioner, 17.

contention that Rickard repeatedly attempted to ram police cars while on the highway; but the government does not disagree with the district court's conclusion that that contention presented a genuine issue of material fact.

The government at one point argues that "*Scott* makes clear that the district court erred in determining that the dangers Rickard posed to the public by 'swerving in traffic while traveling at a high speed' and operating the vehicle with 'disregard for the safety of others' were irrelevant . . . Pet. App. 37." U.S. Br. 24. But the reference to "swerving" and "disregard for the safety of others" are not findings by the district court, but summaries by that court of the factual contentions advanced by the defendants.

The United States suggests that a reasonable officer could conclude that the Sixth Circuit decision in *Smith v. Freland*, 954 F.2d 343 (6th Cir.), cert. denied, 504 U.S. 915 (1992), had held that police may use lethal force to prevent a motorist from returning to the road if the driver has led police on "a high-speed chase." U.S. Br. 26. The driver in *Smith* had been traveling "at speeds in excess of ninety miles per hour," 954 F.3d at 343, in a residential neighborhood. *Scott v. Clay County, Tennessee*, 205 F.3d 867, 878 (6th Cir. 2000). No reasonable officer could conclude that *Smith* had held that such force was permissible against anyone who drives on an interstate highway at any speed that could be labeled "high-speed." The court's conclusion in *Smith* that the driver "had proven he would do almost anything to avoid capture," 954 F.2d at 347, clearly rested on the fact that the driver in that case

twice attempted to crash into police cars, successfully crashed into another, and then "smash[ed] into [a] fence and gate" as he drove off. 954 F.2d at 344. The Sixth Circuit concluded that the driver "posed a significant threat of injury to numerous others," *Dudley v. Eden*, 260 F.3d 722, 726 (2001), because he had in fact attempted to injure the police officers. The government describes *Scott v. Clay Cnty, Tenn.*, 205 F.3d 867 (6th Cir.), cert. denied, 531 U.S. 874 (2000), as "finding no Fourth Amendment violation for police shooting [a] motorist after [a] high-speed flight." (U.S. Br. 27). The driver in *Scott* had done far more than just fell; he attempted to run over a Sheriff and Deputy Sheriff, "commit[ing] serious, life-threatening crimes in the presence of the defendant officers." 205 F.3d at 877.

In the instant case, Rickard had chosen to exit I-40; the issue is whether the manner in which he had driven on the highway demonstrated he was likely to drive on city streets in a manner that posed a significant threat to the safety of others.[25] If there were an indisputable video recording which demonstrated that while on the highway Rickard had driven at 100 m.p.h., repeatedly attempted to ram police cars, and swerved in front of other cars, forcing them to the side of the road, those would be facts on the basis of which a reasonable officer could

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[25] "If successful in that attempt [to get back on the road], Richard *might* have posed precisely the same threat to innocent bystanders as the motorist in *Scott*." U.S. Br. 24(emphasis added).

conclude that the use of lethal force was justified to prevent Rickard from returning to the road. But the unresolved disputes about what occurred on I-40 preclude summary judgment on such a theory.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JAN 6 2014
OFFICE OF THE CLERK

No. 12-1117

IN THE
Supreme Court of the United States

OFFICER VANCE PLUMHOFF, *et al.*,
Petitioners,

v.

WHITNE RICKARD, A MINOR CHILD, INDIVIDUALLY, AND AS SURVIVING DAUGHTER OF DONALD RICKARD, DECEASED, BY AND THROUGH HER MOTHER SAMANTHA RICKARD, AS PARENT AND NEXT FRIEND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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January 6, 2014

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INTEREST OF AMICI CURIAE[1]

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The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the amici made a monetary contribution to its preparation (Rule 37.6).

executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Amici and their members represent all levels of state and local government, including law enforcement agencies such as state police, county sheriff departments, and city police departments. Amici and their members have an interest in ensuring that law enforcement officers have appropriate flexibility to make critical decisions to use force to protect the public, without facing the specter of money damages and attorneys' fees awards, staggering defense costs, and the distractions of civil lawsuits. Although this Court's recent decisions have emphasized the crucial role of qualified immunity, lower courts continue to improperly deny officers the protection of qualified immunity in cases involving Fourth Amendment force claims. Lower courts are denying immunity in these cases based on a misunderstanding of the correct principles that apply at summary judgment. Even when the material facts

are not disputed, lower courts are treating disputes about whether force was reasonable as a reason to not even address whether the officers have immunity. Amici and their members have an interest in this Court reminding lower courts of the rules that apply at summary judgment when determining claims of immunity from Fourth Amendment force claims, and amici respectfully urge the Court to do so in its decision in this case.

SUMMARY OF ARGUMENT

After this Court's recent decisions in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), and *Scott v. Harris*, 550 U.S. 372 (2007), finding officers immune from Fourth Amendment deadly force claims, this case should have been an easy one for the court of appeals to find that the petitioner officers were immune. Here, respondent's decedent Donald Rickard engaged in behavior more dangerous than the behavior of the respondents in both of those cases combined. And under this Court's recent immunity decisions, officers are immune where the existence of a constitutional violation is not "beyond debate," *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011)—or, put differently, when the lawfulness of officers' conduct is "arguable," *Reichle v. Howards*, 132 S. Ct. 2088, 2096 (2012), in light of existing law.

Notwithstanding this precedent, the court of appeals denied immunity at summary judgment. The court of appeals denied immunity and held that a trial was needed, but not because there was a genuine conflict about *what happened*. Rather, there were competing arguments in the tranquility of the courtroom about whether, on these facts, officers on the scene could have concluded that the threat Rickard posed to them—and the innocent public—made deadly

force reasonable under the Fourth Amendment. The court of appeals never addressed the distinct issue of whether the officers still had immunity, even if the force was unreasonable.

The court of appeals made a fundamental error in not addressing the separate question of immunity. Even assuming for a moment that there was a material factual dispute here whether the Fourth Amendment was violated, that did not preclude resolving the immunity question. As this Court explained in *Saucier v. Katz*, 533 U.S. 194 (2001), the immunity inquiry in a force case is separate from the Fourth Amendment inquiry, and it involves significantly greater deference to officers' judgments. That deference means that what might count as a material factual dispute for purposes of summary judgment at the first prong of a qualified immunity analysis—whether the Fourth Amendment was violated—is no longer material at the second, "clearly established law," prong of the immunity analysis. Qualified immunity permits officers to make mistaken judgments, so long as their judgments are not "plainly incompetent." *Stanton v. Sims*, No. 12-1217, 2013 WL 5878007, at *2 (U.S. Nov. 4, 2013) (per curiam). That protection applies to officers' conclusions about the law *and* the facts. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Even when the facts most favorable to the plaintiff might prove an unreasonable seizure under the Fourth Amendment, a material factual dispute does not exist for immunity purposes unless those facts compel a conclusion that the officers' actions were so obviously egregious that they were outside the range of conduct permitted by immunity. The court of appeals erred in denying the officers the range of judgments about the law and the facts that qualified immunity entitles them to make.

Other lower courts have denied immunity in recent Fourth Amendment force cases, based on the same fundamental confusion about which disputes at summary judgment are factual and which disputes are legal. As a result, countless officers and their public employers must needlessly face the burdens of litigation and trial—and every officer must make life-or-death decisions in the shadow of potentially devastating personal liability.

Given the persistence of these errors, amici respectfully urge this Court to use this decision to summarize the rules that differentiate material factual disputes from legal arguments at summary judgment, when officers invoke qualified immunity from Fourth Amendment force claims: Officers retain qualified immunity from Fourth Amendment force claims so long as it is arguable, on the historical facts[2] most favorable to plaintiff, that the force was reasonable. In evaluating immunity, a court must adopt the inferences that a reasonable officer could arguably draw from the historical facts, regardless of whether those inferences are factual or legal. It is a legal question whether—based on the historical facts, the inferences an officer could arguably draw from them, and clearly established law—only a plainly incompetent officer could conclude that force was reasonable.

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[2] This Court's decisions use the term "historical facts" as a shorthand way to describe the facts available to the officer at the time of the challenged search or seizure, to which the court then applies Fourth Amendment law to determine whether the officer's conduct was reasonable. *E.g.*, *Maryland v. Pringle*, 540 U.S. 366, 371-72 (2003).

ARGUMENT

I. The court of appeals denied qualified immunity, even though immunity was plainly warranted, because it mistook competing legal arguments about reasonableness for factual disputes that precluded summary judgment.

After this Court's two most recent decisions finding law enforcement officers immune from Fourth Amendment force claims—*Brosseau*, 543 U.S. 194, and *Scott*, 550 U.S. 372—there should have been little doubt that qualified immunity shields the petitioners here from the respondent's similar Fourth Amendment force claim. After all, in this 2004 incident, Rickard managed to engage in more dangerous behavior than the respondents in *both* of those earlier cases *combined*.

Rickard began this incident like Victor Harris, by fleeing a traffic stop and driving recklessly along the freeways, threatening the lives of innocent motorists and police officers. Rickard continued to menace motorists and officers even as he attempted to elude the police by crossing the Mississippi River from Arkansas into Tennessee, and then darting off the freeway to Memphis surface streets.

Then, after officers used their vehicles to partially box in Rickard's car in a Memphis parking lot, Rickard reenacted Kenneth Haugen's dangerous behavior. Like Haugen, Rickard refused to stop even when an officer on foot ordered him to do so and pounded on his windshield with a pistol. And like Haugen, Rickard persisted in his reckless flight, endangering other officers who were on foot as well as innocent drivers on the nearby roadway. If anything, Rickard posed a

greater threat than Haugen: while Officer Brosseau's fellow officers were a few houses away, here several officers were on foot, right next to Rickard's vehicle. The videos show Rickard's car's tires spinning as he rammed a police vehicle with petitioner Plumhoff next to him. Then, Rickard reversed his vehicle in a 180-degree turn, and another officer had to dodge the vehicle to avoid getting run over. Unlike Haugen, Rickard had already amply demonstrated his willingness to use his vehicle to menace innocent motorists on the public roadways and the police officers trying to arrest him.

The case for immunity should have been apparent here. Given that Rickard posed a risk to officers and the public greater than the risks in *Brosseau* and *Scott*, it was at least "arguable," *Reichle*, 132 S. Ct. at 2096, that deadly force was a reasonable response here. Indeed, as petitioners have shown, several lower court decisions found deadly force reasonable on similar facts, or at least that qualified immunity applied. Pet'rs' Br. 28-35.

Nevertheless, the court of appeals denied immunity. It denied immunity without identifying any genuine dispute about what Rickard did,[3] or the amount of

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[3] The videos in this case certainly do not *create* a factual dispute about whether Rickard tried to ram officers' vehicles on the freeway—or about any other fact in the case. The court of appeals concluded, correctly, that the videos simply don't show much at certain points of the incident, stating that, "After carefully reviewing the video, as did the district judge, we cannot conclude that it provides clear support for either the plaintiff's or the defendants' version of what occurred." Pet. App. 10; *accord id.* at 9 (whether officers were in personal danger "is not resolved by the video recordings"). The respondent likewise acknowledges this. Opp'n to Pet. 3 (during the freeway pursuit, "it is difficult to tell from the video what the proximity of the vehicles was to

force the officers used. Indeed, respondent identifies no dispute about the material facts to which the officers testified. Rather, respondent identified only disputes about the "characterizations" of those facts, such as what conclusions a reasonable officer could draw from Rickard's behavior about the threat Rickard posed. Opp'n to Pet. 7, 30. Similarly, respondent urged that the number of shots fired could lead a jury to find the force unreasonable. *Id.* at 16-17. The court of appeals agreed with respondent that there was a triable issue. Accordingly, the court of appeals adopted the district court's conclusions that on "the facts, considered in a light most favorable to the plaintiff," a reasonable officer would not "have considered Rickard's continued flight a clear risk to others." Pet. App. 6, 12. The court of appeals found a triable issue of fact, not because there was a genuine conflict about *what happened*, but rather because there was a conflict about whether, on those facts, officers could conclude deadly force was reasonable. *Id.* at 10. The court of appeals also relied on that triable issue in denying qualified immunity. *Id.* at 12. Apart from that, the court offered no explanation of why it did not analyze the state of case law as of 2004 to determine whether it was at least arguable that deadly force was permissible. *Id.*

The court of appeals' decision not to analyze similar cases to determine whether the law here was "clearly established" as of 2004 was based on a more fundamental mistake in its analysis. That mistake was to identify the disputes in this case as factual disputes that precluded summary judgment, when

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each other."). Of course, if the videos do not clearly depict what occurred, then they cannot create a genuine factual dispute about what occurred.

they were actually legal disputes capable of resolution by the court.

The court of appeals took the view that when officers are confronted with behavior like Rickard's, officers cannot rely on legal rules that state what inferences an objectively reasonable officer is (or is not) entitled to draw from that behavior, about whether the person may pose a threat of death or serious physical injury to officers or the public. And officers cannot rely on a legal rule that deadly force is reasonable in the face of such a threat. Nor can officers rely on the leeway that qualified immunity permits officers for their legal *and* factual judgments.

II. When an officer invokes qualified immunity from a Fourth Amendment force claim at summary judgment, a plaintiff is entitled to have evidentiary disputes about what happened—the historical facts—resolved in his or her favor, but disputes about what an officer could have concluded from those historical facts, and the ultimate reasonableness of force, are legal arguments.

The court of appeals here found a factual dispute, even though the disputed issues before it were actually legal ones. Such a mistake is not surprising, for two reasons. First, there is a close connection between the facts and the law in a force case. As this Court has observed, even when the facts are undisputed, the legal task of determining what is reasonable force under the Fourth Amendment involves "slosh[ing] our way through the factbound morass of 'reasonableness,'" *Scott*, 550 U.S. at 383. Second, the likelihood of mistaking legal disputes for factual ones only increases when officers invoke their right to immunity

at summary judgment. On the one hand, procedural summary judgment law obligates the court to resolve material factual disputes in favor of the non-moving party. But on the other hand, substantive immunity law requires deference to officers' judgments about the significance of what happened—including judgments about the facts, even if they are mistaken. *Pearson*, 555 U.S. at 231. That substantive law renders many supposed factual disputes immaterial. These difficulties have led other lower courts to make similar errors at summary judgment, and mistakenly deny immunity. *Infra* Part III.

Given these difficulties, the lower courts would be well served by a plain statement from this Court that draws lines between the deference that a plaintiff's facts receive at summary judgment, and the deference that officers receive as a matter of immunity law with regard to the conclusions they are permitted to draw from those facts. Amici respectfully urge that the applicable rule can be stated as follows: Officers retain qualified immunity from Fourth Amendment force claims so long as it is "arguable," *Reichle*, 132 S. Ct. at 2096, on the historical facts most favorable to plaintiff, that the force was reasonable. In evaluating immunity, a court must adopt the inferences that a reasonable officer could arguably draw from the historical facts, regardless of whether those inferences are factual or legal. It is a legal question whether—based on these historical facts, the inferences an officer could arguably draw from them, and clearly established law—only a "plainly incompetent," *Stanton*, 2013 WL 5878007, at *2, officer could conclude that force was reasonable.

This standard follows from the rules that govern motions for summary judgment, *infra* Part II.A, and

from this Court's Fourth Amendment decisions, *infra* Part II.B., and immunity decisions, *infra* Part II.C.

A. What counts as a material factual dispute depends on whether a court proceeds on the first or second prong of qualified immunity analysis.

The first task in any summary judgment motion, including motions invoking immunity in a Fourth Amendment force case, is "to determine the relevant facts." *Scott*, 550 U.S. at 378. But what facts are relevant at summary judgment is governed by the substantive law applicable to the motion. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In a qualified immunity case, the governing law is different depending on whether a court proceeds on the first or second prong of the analysis. Therefore, what counts as the "relevant facts" and a "material" dispute is different, depending on whether a court proceeds on the first prong—whether the officer's conduct violated the Fourth Amendment—or the second—whether the unlawfulness of the officer's conduct was beyond debate under clearly established law, after allowing for factual mistakes that are not so unreasonable only a plainly incompetent officer would make them.

Officers begin with a great deal of deference to their view of the facts as a matter of regular Fourth Amendment analysis. *Infra* Part II.B. Immunity then increases the degree of that deference. *Infra* Part II.C. Indeed, immunity allows officers every reasonable

conclusion about the law and the facts, as well as many unreasonable ones. *Pearson*, 555 U.S. at 231. Given this legal standard, a plaintiff's argument that other inferences and conclusions from the facts would have been more reasonable under the circumstances does not present a material factual dispute, except in cases of obviously egregious force.

B. At the first prong of immunity analysis, the Fourth Amendment entitles officers to make reasonable inferences about dangerousness from the historical facts most favorable to the plaintiff—even if there might have been other plausible inferences to the contrary.

Under this Court's Fourth Amendment decisions, officers are entitled to draw reasonable inferences and conclusions from the historical facts to decide whether they face a dangerous individual or situation. Once the historical facts are established for purposes of summary judgment, the law does *not* require any continuing acceptance of inferences favorable to the plaintiff. As a matter of law, officers are entitled to draw inferences from those historical facts that a reasonable officer could draw, regardless of whether there might be some innocent explanation for the facts. It is a legal matter what inferences the law permits officers to make on a given set of facts. The obligations of the Fourth Amendment do not vary from place to place or jury to jury.

1. Under *Graham v. Connor*, 490 U.S. 386, 388 (1989), a claim that an officer used excessive force in making a search or seizure is governed by the "objective reasonableness" standard of the Fourth Amendment. This Court has previously explained that the reasonableness of force under the Fourth

Amendment on a given set of facts is a "pure question of law." *Scott*, 550 U.S. at 381 n.8. With regard to that legal question, the most hotly disputed issue in most Fourth Amendment cases involving deadly force—including this one—is whether "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Assessing the existence of probable cause to believe a suspect poses a threat of serious physical harm requires consideration of what inferences and conclusions an officer is entitled to draw from the facts before him or her.

a. This Court's Fourth Amendment force decisions have not expressly stated whether an officer's inferences and conclusions about the existence of a threat are factual or legal for purposes of summary judgment. However, these decisions strongly suggest that the validity of an officer's judgments about dangerousness, on a given set of historical facts, presents a legal issue.[4] That suggestion is correct. After all, the reasonableness of an officer's threat assessment on a given set of facts is central to a determination of whether deadly force was reasonable under the Fourth Amendment. *Id.*; *accord Scott*, 550 U.S. at 384; *Brosseau*, 543 U.S. at 197-198; *Garner*, 471 U.S. at 11; *cf. Graham*, 490 U.S. at 396 (identifying threat posed by seized individual as factor in reasonableness analysis).

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[4] Because immunity law permits officers to make mistaken judgments about the law, the facts, and mixed questions, *Pearson*, 555 U.S. at 231, these distinctions lose significance at the second prong of immunity analysis. *Infra* Part II.C.

This Court's force decisions provide further support for the view that this is a legal issue. These decisions repeatedly emphasize the deference that officers receive for their judgments about the facts in force cases. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. Whether force appears reasonable is measured from the perspective of the officer, not a lay juror: "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). And in *Saucier*, this Court expressly confirmed that the test for reasonable force requires *deference* to the judgment of a reasonable officer. "We set out a test [in *Graham*] that cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene." *Saucier*, 533 U.S. at 205 (quoting *Graham*). Likewise, in *Scott*, the reasonableness analysis relied on inferences that the officers were permitted to draw that the respondent would be a threat to the public if officers called off their pursuit. 550 U.S. at 385. This Court rejected the suggestion that an inference about the probability that the respondent would continue to pose a danger would be a "factual assumption[]" in favor of the officer, and that accepting this inference would somehow violate normal summary judgment principles. *Id.* at 385 n.11.

All of these decisions indicate that Fourth Amendment force law entitles officers to make reasonable inferences and judgments about dangerousness based

on the historical facts—notwithstanding that a lay jury might find other inferences plausible.[5]

b. In deferring to the professional judgment of reasonable officers, this Court's force decisions are consistent with its other Fourth Amendment prece-

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[5] It is not always easy to draw lines between determining the "historical facts" in a Fourth Amendment case, *Pringle*, 540 U.S. at 371-72, and the judgments a reasonable officer is entitled to make given those facts. Nor is it necessary to do so in very clear cases. For example, in *Scott* the fact that the respondent was driving dangerously was so clear that no exercise of professional judgment was required to reach that conclusion. There, the Court reviewed the record to assess whether a reasonable jury could agree with respondent on "the factual issue whether respondent was driving in such fashion as to endanger human life." 550 U.S. at 380. The Court found the respondent's driving was so plainly dangerous that no reasonable jury could believe that he was not driving dangerously.

If *Scott* had been a closer case, *Graham*'s principles of adopting the officer's perspective and deference to reasonable judgments by officers on the scene would have supported differentiating between the "historical facts" as they appeared to the officers—matters such as the driver's speed, lane changing, and violations of the rules of the road—and a reasonable officer's judgments from these historical facts about whether the driver posed a danger. Then, the court would ask: Would a reasonable officer conclude on these historical facts that the driver was driving in such a fashion as to endanger human life?

Regardless of the boundary between factual and legal issues for purposes of pure Fourth Amendment analysis, however, the court asks a different question at the second prong of immunity analysis, *infra* Part II.C. Given that immunity permits officers to make legal and factual judgments about which reasonable people could disagree, the fact-law distinction disappears so long as officers' judgments are involved. Therefore, at the second prong, the court would ask: Given the historical facts, would "every reasonable official," *Al-Kidd*, 131 S. Ct. at 2083, reach the conclusion that the respondent was not driving in a fashion as to endanger human life?

dents. As discussed above, *Graham* relied on *Terry* for its core principle of deference to reasonable officer judgments about officer safety and public safety. In *Terry*, this Court explained that an officer may rely on the historical facts and on "reasonable inferences which he is entitled to draw from the facts in light of his experience," in assessing "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27. Similarly, in *Michigan v. Long*, 463 U.S. 1032 (1983), this Court explained that an officer could search the passenger compartments of a vehicle "if the police officer possesses a reasonable belief based on specific and articulable facts which, *taken together with the rational inferences from those facts*, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* at 1049 (quoting *Terry*, 392 U.S. at 21) (internal quotation marks omitted and emphasis added). In these contexts, the central exercise in the reasonableness analysis is determining what inferences an objectively reasonable officer is entitled to draw from a given set of facts concerning the existence of a danger to officers or others. This is no different from determining reasonableness in a force case.

Likewise, the legal principles that apply to Fourth Amendment probable cause analysis should also apply to officers' judgments about the existence of a threat. It is for good reason that this Court in *Garner* stated the relevant test as "*probable cause to believe* that the suspect poses a *threat* of serious physical harm, either to the officer or others." *Garner*, 471 U.S. at 11 (emphasis added). Just as officers must make decisions to arrest for criminal conduct in the face of

uncertainty, so must they also make decisions whether to use force. "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Thus, when officers assess probable cause, they are entitled to rely on inferences from the facts before them that a reasonable officer could make. "[O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists." *Ornelas v. United States*, 517 U.S. 690, 700 (1996). In determining probable cause to arrest, a court considers both the "historical facts" and the "reasonable inference[s]" that could be drawn from them, "viewed from the standpoint of an objectively reasonable police officer." *Maryland v. Pringle*, 540 U.S. 366, 371-72 (2003) (quoting *Ornelas*, 517 U.S. at 696) (internal quotation marks omitted). Probable cause law entitles officers to make these inferences so long as they are reasonable. A contention that other inferences were more reasonable is a legal argument, not a factual dispute. There is no reason to depart from these Fourth Amendment principles in force cases.

2. Respondent here suggests that disputes about "reasonableness" are factual. Opp'n to Pet. 5. But on a given set of historical facts, the reasonableness of force is not a jury question, any more than whether certain facts give rise to probable cause to arrest is a jury question. Rather, it is a "purely legal question." *Scott*, 550 U.S. at 381 n.8. Treating this question as a factual one would mean that the Fourth Amendment's reasonableness standard would vary from place to place and time to time—a consequence that this Court

has found unacceptable in its Fourth Amendment decisions. *See, e.g., Devenpeck v. Alford*, 543 U.S. 146, 154 (2004) (rejecting "closely related offense" rule for probable cause to arrest, and stating, "We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection."); *Ornelas*, 517 U.S. at 697 (holding that *de novo* review applies to probable cause determinations, and noting this standard prevents "varied results [that] would be inconsistent with the idea of a unitary system of law").

There may be some surface appeal to analogizing the "reasonableness" determination under the Fourth Amendment to the "reasonableness" determination in a state law negligence case, where the jury traditionally decides whether reasonable care was exercised. But that analogy falls apart in light of the differences between state negligence laws and the Constitution. The results of tort cases may vary on similar facts, but the Constitution does not.

> [T]he Constitution is not a form of tort law. It creates legal rules. Permitting the jury freedom to determine for itself whether particular conduct was reasonable within the meaning of the fourth amendment would introduce the *ex post* reassessment that *Graham* decried. Under the Constitution, the right question is how things appeared to objectively reasonable officers at the time of the events, *not* how they appear in the courtroom to a cross-section of the civilian community.

Bell v. Irwin, 321 F.3d 637, 640 (7th Cir. 2003). Under this Court's cases, the reasonableness of force should be a question of law, involving the balancing of governmental interests and individual interests. Juries do not do that. Courts do. *E.g., Scott*, 550 U.S.

at 384 ("So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person?").

C. At the second prong of immunity analysis, officers are entitled to every arguable inference about dangerousness from the historical facts most favorable to plaintiff, as well as great latitude in their perception of those facts—and officers lose immunity only if their force was so obviously egregious in light of clearly established law that only a plainly incompetent officer would have concluded the force was lawful.

While *plaintiffs* get the benefit of favorable factual inferences when it comes to determining the historical facts—what happened—immunity law demands that *officers* receive the benefit of every inference that could be drawn from the historical facts concerning the danger posed by a suspect. "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 555 U.S. at 231 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)); *Butz v. Economou*, 438 U.S. 478, 507 (1978). This principle protects officials' judgments about dangerousness, regardless of whether these are characterized as factual, legal, or mixed judgments. And this Court's Fourth Amendment immunity decisions have protected officers' judgments about dangerousness, without parsing any such distinctions.

1. Qualified immunity provides breathing room for officials to vigorously enforce the law without undue fear of personal liability, and without the distractions incident to a civil lawsuit. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012); *Pearson*, 555 U.S. at 231. And in force cases, this protection is even more consequential. Hesitating to act in the face of a potential threat to the innocent public or police officers can have devastating and even fatal results, far worse than time and money spent in civil litigation. *See, e.g.*, DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED 2012, Table 1 (48 law enforcement officers feloniously killed in 2012), Table 65 (52,901 officers assaulted in 2012, with 14,678 officers injured), http://www.fbi.gov/about-us/cjis/ucr/leoka/2012/tables; *State Trooper Seriously Injured After Intentionally Hit By Car in Pulaski Co.*, WSET.COM, Jan. 26, 2013, http://www.wset.com/story/20713689/state-trooper-seriously-injured-after-intentionally-hit-by-car-in-pulaski-co (driver allegedly intentionally drove at police officer at a high rate of speed and struck him); *Beaumont Police Officer Killed When Struck by Chase Suspect*, KHOU.COM, July 9, 2011, http://www.khou.com/news/local/Beaumont-police-officer-struck-killed-by-chase--125265004.html (suspect allegedly intentionally struck police car head-on during high-speed chase killing the officer); *San Francisco Man Gets Life In Prison For Killing Police Officer*, SANFRANCISCO.CBSLOCAL.COM, Jan. 25, 2011, http://sanfrancisco.cbslocal.com/2011/01/25/san-francisco-man-gets-life-in-prison-for-killing-police-officer/ (officer struck and killed during a car chase).

Qualified immunity gives officers protection commensurate with these high stakes. As this Court has explained, qualified immunity precludes individual

damages liability for violating a constitutional right unless the law is so clear that "every reasonable official would have understood that what he is doing violates that right." *Al-Kidd*, 131 S. Ct. at 2083 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (internal quotation marks omitted). The situation must be so clear-cut that it is "beyond debate" that the official transgressed the Constitution. *Id.* Liability is reserved for actions that only a "plainly incompetent" official could have considered lawful. *Stanton*, 2013 WL 5878007, at *2.

Qualified immunity recognizes that police are not judges and should not be held personally liable based on fine distinctions made with the security of hindsight.

> The policeman is not expected to know all of our precedents or those of the Supreme Court, or to distinguish holding from dicta, or to put together precedents for line-drawing, or to discern trends or follow doctrinal trajectories. Otherwise, qualified immunity would be available only to a cop who is a professor of criminal procedure in her spare time. The police cannot be expected to know such things at risk of *personal liability* for the policeman's savings, home equity, and college funds.

Gonzalez v. City of Schenectady, 728 F.3d 149, 162 (2d Cir. 2013). Thus, in the absence of uniform on-point case law prohibiting conduct on a given set of facts, immunity is lost only if the official conduct is "obviously egregious" under the Constitution. *Becker v. Bateman*, 709 F.3d 1019, 1025 (10th Cir. 2013) (holding officer immune from Fourth Amendment force claim).

Immunity applies equally to Fourth Amendment claims, notwithstanding that officers might end up immunized for unreasonable searches and seizures. *Anderson*, 483 U.S. at 644. And qualified immunity applies equally to force claims, providing an additional layer of protection and even greater deference to officers than the already deferential Fourth Amendment test for reasonable force. *Saucier*, 533 U.S. at 205-06. The immunity serves to "protect officers from the sometimes hazy border between excessive and acceptable force." *Id.* at 206.

The fact-bound nature of Fourth Amendment reasonable force analysis does not call for bypassing an immunity analysis where the facts are undisputed but reasonable people could disagree about the reasonableness of force. Rather, the fact-bound nature of the analysis often leaves room for debate about whether force was reasonable. That is precisely the zone in which immunity protects officers' judgments. This Court recognizes that the factual specificity of force cases makes it difficult to identify clearly established prohibitions on officials' conduct.

> It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. . . .
>
> *Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances.

Id. at 205; *see also Brosseau*, 543 U.S. at 201 ("[T]his area is one in which the result depends very much on the facts of each case."). The need for qualified immunity to protect officers is even greater in this area of the law, so that officers are not held liable for breaching unforeseen legal prohibitions that are highly fact specific.

Immunity protects fact-specific judgments by officials, like the judgments involved in evaluating the risk posed by a situation or by a suspect. In recognition of the reality that officials are called upon to make judgments about the facts as well as the law, this Court applies qualified immunity to both kinds of judgments. *Pearson*, 555 U.S. at 231. Under this principle, a court analyzing immunity is indifferent to whether an officer's judgment is factual or legal. A court need not differentiate between an official's perception of the facts, his or her professional judgments about what inferences to draw from the facts, or his or her ultimate judgments about reasonableness. A mistake at any of these steps is permissible, so long as it is not a mistake that only a plainly incompetent officer would make. Given a set of facts, a court is obligated to allow any conclusion from those facts that a reasonable officer could arguably draw. And in light of those facts and conclusions—and then-clearly established law—a court must recognize immunity unless only a plainly incompetent officer could have concluded that his or her conduct was permitted by the Fourth Amendment.

2. In practice, this Court has applied great deference in Fourth Amendment immunity cases when it comes to officers' evaluation of possible threats to officer safety or public safety. If an inference about dangerousness is at least arguable, the officer receives

the benefit of that inference. Under this Court's immunity decisions, whether the facts permit an inference of dangerousness is a legal question—not a factual one that triggers an obligation at summary judgment to accept whatever alternative interpretation of the facts is tendered by the non-moving party.

a. Recently, this Court's decision in *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (per curiam), involved officers who were investigating a rumor that a student was planning to "shoot up" his school. After an initial investigation at the student's school, officers visited the student at home. The student's mother did not want to talk with the officers and refused to let them in. When the officers asked her whether there were guns in the home, she immediately turned around and ran into the house without a word. Officers were "scared" because they "'didn't know what was in that house' and had 'seen too many officers killed,'" and they were "concerned about 'officer safety.'" *Id.* at 989. The officers followed the mother into the home. The student's family sued the officers for the entry, claiming it violated the Fourth Amendment. The district court found immunity, but the court of appeals denied immunity.

This Court summarily reversed, and stated the deferential standard that applies to officers' legal and factual judgments in identifying dangerous situations. "In sum, *reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted* them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent." *Id.* at 992 (emphasis added). The officers also received deference as to whether there was an objectively reasonable

basis to fear imminent violence: "And a reasonable officer could have come to such a conclusion based on the facts as found by the District Court." *Id.* (emphasis added). Citing *Graham*, the Court emphasized that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Id.* at 991-92.

b. The deferential analysis in *Ryburn* was consistent with *Saucier*, where this Court first explained in detail how officers claiming immunity from a Fourth Amendment force claim are entitled to all inferences that a reasonable officer could draw regarding a safety threat—and some unreasonable ones—even at summary judgment. So long as "a reasonable officer" in the same position "could have believed" that his or her response "was within the bounds of appropriate police responses," the officer is immune. *Saucier*, 533 U.S. at 208. Where an officer does "not know the full extent of the threat" posed by an individual, that uncertainty weighs in favor of immunity, not against it. *Id.* Therefore, in *Saucier*, where the "circumstances show[ed] some degree of urgency" to get a potentially threatening protestor away from the Vice President, *id.* at 209, the Court did not parse the degree of urgency or whether a jury might conclude that the situation was not actually so urgent. Regardless of what a jury might think, immunity applied because the facts *permitted* the officer to conclude that some threat was present.

c. In *Brosseau*, 543 U.S. 194, this Court applied *Saucier*'s principles of deference to officer judgments about public safety and officer safety to find immunity for the use of deadly force. Respondent Haugen had an outstanding no-bail felony warrant and initially

attempted to flee from officers on foot. He jumped into his Jeep, locked the door, and started to drive away, even after Officer Brosseau smashed the window and struck him with her pistol. Brosseau then fired at Haugen from the back, because she was "fearful for the other officers on foot who [she] believed were in the immediate area, [and] for the occupied vehicles in [Haugen's] path and for any other citizens who might be in the area." *Id.* at 197 (internal quotation marks omitted, alterations in original).

As in *Ryburn*, this Court summarily reversed the court of appeals' denial of immunity. And like in *Ryburn* and *Saucier*, this Court deferred to the officer's assessment of risk presented by this situation. For purposes of immunity analysis, this Court accepted the officer's assessment that "persons in the immediate area [were] at risk from the flight." *Id.* at 200. Notably, the Court did so even while construing the material facts at summary judgment most favorably to the non-moving party. *Id.* at 195, n.2. The Court's analysis reflected that in an immunity case, construing the facts at summary judgment favorably to the non-moving party does not mean accepting the non-moving party's arguments about what risk assessment was warranted on those facts. Even at summary judgment, the officer received the benefit of her judgments about dangerousness, because her judgments were not so unreasonable that they fell outside the range of judgments that immunity permits. For purposes of immunity analysis, all that mattered in *Brosseau* was that there were civilians and officers in the neighborhood, and that Haugen was continuing his efforts to flee the police behind the wheel of a vehicle.

d. The exceedingly deferential perspective that a court adopts in an immunity case is one reason why immunity remains a legal question for the court in Fourth Amendment cases, even when a jury could take a different view if it were charged with determining "reasonableness." "[T]he court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991) (per curiam) (finding immunity from Fourth Amendment arrest claim).

In summary, when a court is evaluating at summary judgment whether officers are immune from a Fourth Amendment force claim, courts must resolve all disputes about the historical facts in favor of the plaintiff—but then the court must draw inferences from these historical facts that a reasonable officer could arguably draw regarding the threat posed by the suspect. That distinction is consistent with normal summary judgment rules because the question of what conclusions a reasonable officer is entitled to draw from these historical facts is a matter of immunity law, not a factual issue. So long as it is "arguable," *Reichle*, 132 S. Ct. at 2096, that an officer's force was reasonable in light of clearly established law and the facts before him or her, immunity applies. The only factual or legal judgments forbidden to officers are those that are so unreasonable that only a "plainly incompetent" officer could make them, *Stanton*, 2013 WL 5878007, at *2.

III. The Court should provide much-needed guidance to lower courts about the rules that apply at summary judgment when officers invoke qualified immunity from Fourth Amendment force claims.

1. In light of this Court's precedents, the error in the court of appeals' analysis was to conclude that immunity must be denied if there are arguments that could be made that the force was unreasonable. But, as discussed above, one does not follow from the other.

There was no dispute here about what happened. Rather, respondent's contentions were *arguments* about (a) the conclusions a reasonable officer could draw from these historical facts about whether Rickard posed a threat of death or serious physical injury, and (b) whether deadly force was ultimately reasonable. Neither of these contentions are material factual disputes for purposes of immunity analysis.

a. It is not material at summary judgment whether there were potentially plausible inferences that Rickard was not dangerous. The existence of competing inferences about dangerousness does not create a material factual dispute, so long as the inferences indicating dangerousness are not so unreasonable that only a plainly incompetent officer could draw them. Applying this standard to the record here, there would not be unanimity among every reasonable officer that there was no probable cause to conclude Rickard posed a threat of serious physical injury or death to officers or the public. Therefore, this contention does not present a triable issue.

b. Given that officers were entitled to conclude that Rickard posed a threat of death or serious physical injury to officers or the public, it was not

clearly established that the amount of force used by each officer here—two, ten, and three shots—was clearly unreasonable under the Fourth Amendment. Respondent has urged that this force was unreasonable because it was more certain to cause death than the force officers used in *Scott* (ramming the vehicle) or *Brosseau* (one officer firing one shot). Whether or not this argument makes any sense for deadly force incidents that post-date this Court's 2007 decision in *Scott*, qualified immunity law means that this argument has no merit in relation to this 2004 incident.

No clearly established law as of 2004 required officers to distinguish between the various tools available to stop a fleeing driver that might involve deadly force—force likely to cause death or serious bodily injury—based on the relative likelihood that different tools would be more or less certain to cause death. As of 2004, deadly force was a single category as far as the law was concerned, and no Supreme Court case suggested that there were differences in degrees of deadly force. Indeed, as petitioners have argued, Pet'rs' Br. 28-29, 40, several decisions of the courts of appeals have found that where officers are initially justified in using deadly force, they are justified in continuing to fire shots until they can confirm that the resisting suspect has surrendered or been disarmed. And other decisions of the courts of appeals found immunity where officers used their firearms rather than their patrol vehicles to stop a dangerous vehicle from fleeing because clearly established law did not distinguish between these degrees of deadly force. *Id.* at 29-34.

These courts of appeals rulings are in accord with the professional judgments of local law enforcement

agencies that all of these instrumentalities constitute deadly force. Police training standards dictate that any number of bullets fired constitutes deadly force, and officers' decisions about when to stop firing at a suspect are to be guided by officers' certainty that the threat that initially justified deadly force has been neutralized. *See, e.g.*, DAVID KLINGER, INTO THE KILL ZONE: A COP'S EYE VIEW OF DEADLY FORCE 34 (2004); Thomas D. Petrowski, *Use-of-Force Policies and Training, A Reasoned Approach (Part Two)*, 72 FBI LAW ENFORCEMENT BULLETIN 24, 29 (Nov. 2002), http://leb.fbi.gov/2002-pdfs/leb-november-2002. Similarly, local law enforcement agencies treat the force used in *Scott*—intentionally colliding with a fleeing vehicle—as deadly force. An International Association of Chiefs of Police study of police department vehicle pursuit policies in the United States indicated that a majority of police department vehicular pursuit policies that were reviewed classified any "contact" tactic like an intentional collision as deadly force. CYNTHIA LUM & GEORGE FACHNER, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM 42-43 (2008).

Given these judgments by the courts of appeals and law enforcement professionals—that all of these instrumentalities are classified as deadly force—one cannot conclude that only a plainly incompetent officer could have believed in 2004 that the law required differentiating between them.

Under the correct standard, the petitioners here retain immunity.

2. Regrettably, the error the court of appeals made here is not unique. Even after *Brosseau* and *Scott*, lower courts continue to deny immunity based on a mistaken view that disputes about the reasonableness

of force under the Fourth Amendment preclude a determination of qualified immunity. Other courts and other decisions have similarly treated disputed *arguments* about Fourth Amendment reasonableness as if they were disputes about historical *facts*, and consequently denied qualified immunity at summary judgment, notwithstanding that there were very few or no disputes about the historical facts—only attorneys' arguments about what conclusions should be drawn from those facts. For example, in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), the court of appeals upheld a denial of immunity at summary judgment on the basis that "[o]n the facts presented here, viewed favorably to the plaintiff, the officers' use of force was not undisputably reasonable." *Id.* at 872. The court reasoned that in a multi-factor reasonableness analysis, some factors could cut in favor of the plaintiffs, while others could cut in favor of the officers. Hence, the dispute about reasonableness had to be decided by a jury. *Id.* at 878. And having decided that the reasonableness of force was a jury question, the court of appeals expressly declined to engage in any analysis of whether clearly established law prohibited deadly force. *Id.* at 870.[6] Other decisions of the courts of appeals show the same error. *See, e.g., Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011) (denying immunity in split decision, where motorcyclist led officers on ten-mile pursuit and officer rammed motorcyclist); *Kanda v. Longo*, 484 Fed.

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[6] The court denied immunity, even while candidly recognizing that "[a] jury could view the facts as the district court did, and likewise reach the conclusion that the officers' use of force was reasonable." *Id.* at 878. But it does not follow from this that immunity should be *denied*. This Court has explained that immunity must be *granted* when the existence of a constitutional violation is not "beyond debate," *Al-Kidd*, 131 S. Ct. at 2083.

Appx. 103, 104-05 (9th Cir. 2012) (denying immunity in split decision, on basis that a jury could weigh factors in Fourth Amendment force analysis differently from district judge who found immunity on undisputed facts); *Hermiz v. City of Southfield*, 484 Fed. Appx. 13, 17 (6th Cir. 2012) (refusing to review on appeal "factual" question whether reasonable officer could conclude a threat existed on the facts).

3. Given the persistence of these errors in the lower courts, amici respectfully urge that this Court take this opportunity to remind the lower courts of the fundamental legal principles that guide the immunity analysis in Fourth Amendment force cases at summary judgment.

This Court's recent decisions have emphasized a court's duty in immunity cases to review then-existing case law governing official conduct, to determine whether it was at least arguably lawful for officials to engage in the challenged conduct. *Stanton*, 2013 WL 5878007, at *2; *Reichle,* 132 S. Ct. at 2095; *Ryburn*, 132 S. Ct. at 990; *Al-Kidd*, 131 S. Ct. at 2083. However, in Fourth Amendment force cases, many lower courts err before even reaching this step of the analysis. Too many lower courts are denying immunity outright, on the mistaken understanding that when the reasonableness of force is subject to dispute, immunity cannot be granted. Too many lower courts are operating under the mistaken understanding that at summary judgment officers are not entitled to every reasonable inference of dangerousness (and even some unreasonable ones) that they can draw from the undisputed historical facts. As a result, law enforcement officers and their state and local government employers are embroiled in protracted and wasteful litigation and trials.

Therefore, amici respectfully urge this Court to use this decision to outline the rules that apply at summary judgment to claims of qualified immunity from Fourth Amendment force claims: Officers retain qualified immunity from Fourth Amendment force claims so long as it is arguable, on the historical facts most favorable to plaintiff, that the force was reasonable. In evaluating immunity, a court must adopt the inferences that a reasonable officer could arguably draw from the historical facts, regardless of whether those inferences are factual or legal. It is a legal question whether—based on these historical facts, the inferences an officer could arguably draw from them, and clearly established law—only a plainly incompetent officer could conclude that force was reasonable.

CONCLUSION

We respectfully request this Court to reverse the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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January 6, 2014

AMICUS CURIAE BRIEF

No. 12-1117

In the Supreme Court of the United States

OFFICER VANCE PLUMHOFF, ET AL.,
Petitioners,

v.

WHITNE RICKARD, A MINOR CHILD, INDIVIDUALLY, AND AS SURVIVING DAUGHTER OF DONALD RICKARD, DECEASED, BY AND THROUGH HER MOTHER SAMANTHA RICKARD, AS PARENT AND NEXT FRIEND,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT AND HUMAN RIGHTS DEFENSE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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CORPORATE DISCLOSURE STATEMENT

The National Police Accountability Project and Human Rights Defense Center are nonprofit organizations that have no parent company and do not issue stock.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nonprofit public interest organizations dedicated to protecting the rights of individuals in their encounters with American law enforcement.

The **National Police Accountability Project** ("NPAP") is a nonprofit organization founded by members of the National Lawyers Guild. NPAP has more than five hundred attorney members throughout the United States who represent plaintiffs in police misconduct cases, and NPAP often presents the views of victims of civil rights violations through *amicus* filings in cases raising issues that transcend the interests of the parties. One of the central missions of NPAP is to promote the accountability of police officers and their employers for violations of the Constitution or laws of the United States.

The **Human Rights Defense Center** ("HRDC") is a Washington nonprofit charitable corporation headquartered in Florida that advocates on behalf of the human rights of those held in American prisons and detention facilities of all types. HRDC's advocacy efforts include publishing Prison Legal News, a monthly publication that covers criminal justice-related news and litigation nationwide, as well as publishing and distributing self-help reference books for prisoners.

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[1] Counsel for the *amici* provided counsel of record for the parties timely written notice of the intent to file this brief. Both petitioners and respondent consented. In addition, no counsel for any party authored any part of this brief, and no party or counsel to a party made a monetary contribution intended to fund the preparation or submission of the brief.

The intended beneficiaries of HRDC's activities include victims of excessive force, and many members of PLN's audience are likewise subject to the frequent use of excessive force.

This case raises significant issues regarding the handling of summary judgment and the availability of interlocutory appeals in police misconduct cases. *Amici* submit this brief to ensure that the right to jury trial is preserved in those matters.

SUMMARY OF ARGUMENT

Around midnight on July 18, 2004, an Arkansas police officer stopped Donald Rickard and Kelley Allen for a broken headlight. Rickard and Allen fled, and several officers pursued them across state lines into Tennessee. After cornering Rickard and Allen in a parking lot, the officers shot them 15 times at close range, killing both.

Based upon their review of the record, *amici* believe that the officers acted unreasonably and in violation of clearly established law, and that the respondent, Rickard's minor daughter, may be able to prevail at trial. The District Court reached the same conclusion, as did the Court of Appeals. The District Attorney General for the relevant county in Tennessee found the officers' conduct to be so egregious as to warrant criminal prosecution.

This Court may differ in its view of the record. It may agree with the petitioners and their supporting *amici* that the officers reasonably perceived that shooting Rickard and Allen was appropriate in light of their vehicular offense, flight, and the risks to members of the public. But the role of this august institution is

not to conduct detailed reviews of trial court records and make factual determinations. As a matter of constitutional law, that is primarily the function of the jury; as a matter of statute, precedent, and policy, it is secondarily the remit of the District Court.

Petitioners and their *amici* ask this Court to view the petition as one raising only legal issues by describing the facts—based on highly contested interpretations of three partial videos of the stop, pursuit, and shootings—as undisputed. They even invite this Court to create a new rule that the reasonableness of the use of force is *always* a purely legal issue, making interlocutory appeals available in virtually every qualified immunity case. This Court should decline these invitations to gut the jury trial right held by victims of police abuse. Video, especially incomplete, low-quality video shot from a police cruiser dashboard, does not eliminate the possibility of genuine factual disputes. And qualified immunity reasonableness analysis is a "factbound morass" suited for jurors and trial judges, not appellate courts.

The opinion of the Court of Appeals should be affirmed, and the case remanded to the District Court for trial.

ARGUMENT

I. The Existence of Video Does Not Eliminate Factual Disputes

Videotape evidence does not eliminate the need for jury fact-finding, and that is particularly so in this case. The Constitution reserves to juries the resolution of disputed factual issues in suits at common law. *See generally* U.S. Const. amend. VII ("In Suits at common

law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."); *see also, e.g., Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935) ("The aim of the amendment . . . is to preserve the substance of the common-law right of trial by jury, . . . and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."). Suits under section 1983 alleging violations of civil rights are "Suits at common law" for purposes of the Amendment, and so a plaintiff is entitled to a jury trial in such matters. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709-10 (1999). As this Court has explained, intrusions on this right must be "scrutinized with the utmost care." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959)).

The proliferation of videotape evidence is not a legitimate basis for limiting the right to jury trial. Juries have long evaluated the credibility of in-court testimony, the content of recorded statements or writings, and the narrative provided by photographs. Video is no different. Like these other sources of evidence, it requires the fact-finder to evaluate the credibility of what is being said (*e.g.*, here, when the officers claimed they saw Rickard ramming police cars).

And, like these other sources of evidence, video requires the fact-finder to reach conclusions about what happened based on a partial view of the world. We cannot see what is happening off camera. We cannot see what happened before the video began, or after it stopped. We cannot see what happened from other angles. We are thus left to make interpretations about the historical record based on incomplete facts.

Common sense tells us that, as a result of this inevitable exercise in interpretation, different viewers will perceive events recorded on video differently. Consider the debates that rage over what "actually" happened on instant replay in the National Football League. Despite cameras of the highest quality recording events from numerous different vantages, reviewed at both regular speed and in slow motion, reasonable minds can differ about something as simple as whether a ball touched the ground before it was caught. Why would it be any easier to reach consensus about something as "tense, uncertain, and rapidly evolving," *Graham v. Connor*, 490 U.S. 386, 396-97 (1989), as a charged confrontation between a police officer and a citizen, recorded by low-quality dashboard cameras capturing only portions of the interaction?

Empirical data confirms that video evidence does not eliminate the possibility of factual disputes. A study published in the Harvard Law Review in 2009 showed 1,350 Americans the videotape at issue in *Scott v. Harris*, 550 U.S. 372 (2007), and asked them to provide their views on the factual issues this Court identified as dispositive. While a substantial majority (75%) interpreted the videotape as this Court did—identifying the citizen as the more culpable party,

and the police officers' use of force as reasonable—a significant minority (25%) did not. Instead, these viewers saw the police as the source of the danger posed by the flight, and found the deliberate ramming of the citizen's vehicle unnecessary to avert the risk to the public. Dan. M. Kahan, David A. Hoffman, and Donald Braman, Whose Eyes Are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism, 122 Harv. L. Rev. 837, 864-66 (2009). Thus, had the *Scott* matter gone to trial, at least some rational jurors might have found in favor of the plaintiffs—as might not only Justice Stevens, but also the distinguished jurists on the lower courts. *See Scott* at 390-96 (Stevens, J., dissenting) (offering an interpretation of events recorded on video that differed from that of the majority, but matched that of the trial and appellate courts).[2]

Here, there is considerable dispute about what happened on the summer night Rickard and Allen were shot, despite the existence of three dashboard videotapes. As respondent's brief catalogs, the videos, affidavits, and deposition testimony leave significant questions regarding:

- Whether Rickard intentionally struck any officer's vehicle during the highway portion of the pursuit;

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[2] Even witnessing an event firsthand does not ensure that one will know the "actual" story. "The most common cause of wrongful convictions is eyewitness misidentification." Gross, Jacoby, Matheson, Montgomery & Patil, Exonerations in the United States 1989 Through 2003, 95 J. of Crim. Law & Criminology 523, 542 (2005).

- Whether Rickard struck any other vehicle;
- Whether Rickard's collision with a police cruiser in the parking lot was caused by an officer ramming him from behind;
- Whether Rickard nearly struck one officer and struck the hand of another;
- Whether the officers were at any risk of being hurt after Rickard backed away and began to drive past them;
- Whether, at the time the officers fired 15 times, Rickard and Allen posed a threat to any member of the public.

These factual disputes prevent the grant of qualified immunity, because they raise the possibility that the officers violated Rickard's clearly-established constitutional rights. Far from settling the matter as a legal issue, "the video makes clear the highly fact-dependent nature of this constitutional determination." *Scott* at 387 (Breyer, J., concurring).

Based on the record before this Court, a number of rational actors have concluded that the officers might have acted unreasonably. Following a detailed analysis of the facts and relevant law, the District Court concluded that there were issues for trial because "the severity of the crime at issue was low, and the suspects posed little immediate threat to the officers or others[;]" it was unclear "[w]hether [Rickard's supposed] assaults" on the officers by ramming his car into theirs had "occurred[;]" the pursuing officers might be just as culpable for creating a hazard to other drivers as was Rickard; and the officers' claimed

perceptions that they had been assaulted and that Rickard presented an imminent danger to others were not reasonable. *Estate of Allen v. City of W. Memphis*, 2011 WL 197426, at *8-10 (W.D. Tenn. Jan. 20, 2011). The Court of Appeals, "[a]fter carefully reviewing the video," held that it "cannot conclude that it provides clear support for either the plaintiff's or the defendants' version of what occurred. . . . [p]articularly . . . as it relates to the degree of danger that the officers were placed in as a result of Rickard's alleged conduct." *Estate of Allen v. City of W. Memphis*, 509 Fed. App'x 388, 392 (6th Cir. 2012). Moreover, the District Attorney General for Shelby County, Tennessee elected to criminally prosecute the officers, and denied their request for pretrial diversion. In his opinion, the officers "acted in an extremely reckless manner without regard for innocent people resulting in the death of the victim[,]" and "the videotapes of the incident did not support [their] request" for diversion. *State v. Galtelli*, 2008 WL 427257, at *4 (Tenn. Crim. App. Feb. 13, 2008). The contention of the officers and their *amici* that the relevant facts undisputedly show the officers' reasonableness is thus unsupportable.

This Court should not displace the historical, constitutionally-reserved jury function of resolving disputed factual issues. Instead, it should affirm the decision of the Court of Appeals and remand this matter to the District Court for trial.

II. At Summary Judgment, Even When Video Is Available, Disputed Factual Issues Prevent a Grant of Qualified Immunity

When a defendant moves for summary judgment on qualified immunity grounds, this Court's precedents require a trial court to evaluate whether (1) the officer's conduct violated a statutory or constitutional right, and (2) whether the right was clearly established. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011). This Court has recently held that these inquiries need not be conducted in sequential order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Regardless of the order in which the analysis is conducted, however, these inquiries are fact-bound ones, and a dispute about the underlying facts prevents a grant of qualified immunity.

Whether an officer has violated a constitutional right depends on factual determinations that may be contested. *See, e.g.*, *Scott* at 378 ("The first step in assessing the constitutionality of [an officer's] actions is to determine the relevant facts."). For example, one cannot determine whether a Fourth Amendment right has been violated without "slosh[ing] our way through [a] factbound morass" that includes such factors as "the risk of bodily harm" to the citizen posed by the officer's use of force, the "threat to the public" posed by the citizen, the "number of lives at risk," and the "relative culpability" of those involved. *Scott* at 383-84. *See also id.* at 386 (Ginsburg, J., concurring) (considering the risks to others posed by the pursuit and the availability of safer means of terminating the flight); *id.* at 387 (Breyer, J., concurring) ("These are the factual inputs that permit the court to carry out the ultimate

constitutional test of balancing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'"). That the Fourth Amendment analysis depends on the "objective reasonableness" of the officer's conduct does not make it any less a question of fact. Although "[t]he question we need to answer is whether [the officer's] actions were objectively reasonable[,]" there is no avoiding the "factbound morass." *Scott* at 381, 383.

The "clearly established right" prong of the qualified immunity analysis also depends on factual findings that may be disputed. To decide whether precedent would have put a reasonable officer on notice that his conduct violated a citizen's constitutional rights, one must determine the facts of the present encounter, and then compare them to the facts of prior cases finding constitutional violations. This inquiry "is one in which the result depends very much on the facts of each case," and it "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198, 201 (2004). How many shots were fired? Where were the police officers? What offense had the citizen committed? Was the citizen attempting to flee? Did he present a threat to others around him? What would the officers on the scene have perceived to be happening? *See, e.g.*, *Brousseau*, 543 U.S. at 199-200; *Saucier v. Katz*, 533 U.S. 194, 208-09 (2001). *See also, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 19 (arguing that relevant facts include "(i) the characteristics of the individuals against whom the force was used; (ii) the behavior of those individuals;

(iii) the risk to other people posed by that behavior; and (iv) the level of force used by the officer").

In its *amicus* brief in support of the petitioners, the National Conference of State Legislatures ("NCSL") argues that, once a set of "historical facts" is established, officers are entitled to draw "every reasonable conclusion about the law and the facts, as well as many unreasonable ones[,]" without liability. Brief of the National Conference of State Legislatures, et al., at 11-12. From this, the NCSL concludes that the reasonableness of an officer's conduct under both prongs of the qualified immunity analysis is a legal issue suitable for immediate determination by a court rather than a jury. *E.g.*, *id.* at 13, 27. This argument fails because it assumes what it seeks to prove. The very purpose of summary judgment is to determine whether there are triable issues of fact. If there are (as both lower courts here held), then there is not a given set of "historical facts" from which a court can make legal determinations, and the matter must be submitted to a jury. It is that jury which is charged with the responsibility to determine the facts, draw inferences, and render a verdict.

The upshot, then, is that disputed factual issues—which can persist even when video is available—prevent the grant of summary judgment in the qualified immunity context. The Court should affirm the decision of the Court of Appeals and remand for trial by the District Court.

III. Even Where Video Is Available, Interlocutory Appeals Should Not Be Available When the Challenge Is to the Sufficiency of the Evidence

While affirming the decision below, this Court should take the opportunity to clarify that interlocutory appeals of denials of qualified immunity are not available when the officers are challenging factual determinations made by the trial court, as is the case here.

Until 2007, this Court's precedents had long made clear that interlocutory appeals were only available where a trial court had entered a decision within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court applied *Cohen* to hold that an appellate court had jurisdiction over an interlocutory appeal by a public official from a summary judgment order denying qualified immunity. That jurisdiction, however, was limited to purely legal issues:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal

> norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Mitchell, 472 U.S. at 528. These questions of law were appealable, in significant part, because they were separate from the underlying merits of the plaintiff's case. *Id.* at 528-29.

Consistent with *Mitchell*, in *Johnson v. Jones*, 515 U.S. 304 (1995), this Court affirmed that interlocutory appeals are not available to public officials denied summary judgment on qualified immunity grounds on the basis of a trial court's determination that there remained genuine issues of fact for trial. *Johnson*, 515 U.S. at 313 (a trial court order determining "which facts a party may, or may not, be able to prove at trial" is "not a 'final decision' within the meaning of the relevant statute"). The Court determined that "precedent, fidelity to statute, and underlying policies" all favored limiting interlocutory appeals on qualified immunity grounds to "abstract issues of law," even though such a rule "forces public officials to trial." *Id.* at 317. It acknowledged that appellate courts might not always be able to easily distinguish between reviewable claims of legal error and nonreviewable claims of factual error, but determined that limiting review to questions of pure law was "more manageable" than any other alternative. *Id.* at 318-19.

In *Scott*, the Court tacitly deviated from these precedents. There, the trial court denied qualified immunity at the summary judgment stage after finding genuine issues of fact for trial. The appellate court permitted an interlocutory appeal, and affirmed the trial court. This Court reversed. It did not address *Johnson*, and did not expressly consider whether an interlocutory appeal was appropriate. However, it remarked generally that orders denying qualified immunity could be subject to interlocutory appeal, 550 U.S. at 376 n.2; and it conducted an independent review of the record and determined that, contrary to the trial court, there was no genuine issue for trial, 550 U.S. at 379-80 & 383-85.

The appellate courts' efforts to reconcile these decisions have produced varying, contradictory rules. *Compare, e.g., George v. Morris*, 736 F.3d 829, 835-36 (2013) (concluding that *Scott* had not abrogated *Johnson*) and *Romo v. Largen*, 723 F.3d 670, 675 (6th Cir. 2013) (same) with *Johnson v. Niehus*, 491 Fed. App'x 945, 949-53 (11th Cir. 2012) (reading *Johnson* narrowly and adopting the intensive factual review of *Scott*) and *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010) (viewing *Scott* as an exception to *Johnson*); *see also, e.g., Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (3d Cir. 2007) (viewing *Scott* as "the outer limit of the principle of *Johnson*"). This tension was apparent in the proceedings below, where the Court of Appeals initially dismissed the interlocutory appeal for want of jurisdiction; then reversed course and accepted the appeal; and ultimately upheld the District Court decision on alternative bases. "Whether we call it a dismissal for lack of jurisdiction or an affirmance of the

denial of qualified immunity, the result is the same." *Estate of Allen*, 509 Fed. App'x at 393.

This Court should now clarify that *Scott* did not create an exception to *Johnson*, and that interlocutory appeals challenging a trial court's factual determinations are not permissible. *Johnson* reached the correct result. Where a defendant seeks to appeal a denial of qualified immunity because he disagrees with the facts found by the trial court, he is not seeking resolution of a separate, abstract legal issue unconnected from the merits. To the contrary, he is leveling a direct attack on those factual findings, no matter how he labels it. Detailed review of the summary judgment record to identify jury issues is the trial courts' bailiwick, and an "unwise use of appellate courts' time . . . ." *Johnson*, 515 U.S. at 317. Nothing about the availability of videotape alters this calculus. The circuit courts' confusion over the scope of permissible appeals following *Scott* warrants limitation of that decision to its facts, not disposal of the careful consideration of statute, precedent, and policy found in *Johnson*.

In addition to providing doctrinal clarity, a ruling affirming *Johnson* and limiting *Scott* to its facts would have valuable practical consequences. Permitting interlocutory appeals of factual determinations adds years to the time for resolution of suit, paradoxically undercutting the very protection it is intended to provide, as officers remain under the shadow of liability during the pendency of the appeal. That same delay also harms citizens and next of kin who have suffered potentially fatal mistreatment at the hands of those officers, and who must watch their cases wend,

piecemeal, through the courts before they receive a verdict on their claims. Where facts are in dispute, the parties and the judicial system benefit from a prompt jury determination.

* * * *

This case brings to the fore important questions about the role of the jury in qualified immunity cases. The combination of procedural proposals made by the petitioners and their *amici*, if accepted by this Court, would dramatically undermine the jury trial right in police misconduct cases. Because (in their view) videotape can eliminate the possibility of factual disputes, every case where there is videotape presents purely legal issues that could be resolved at summary judgment. And, for the same reasons, if summary judgment is denied to the officers, they will have an interlocutory appeal—where the admittedly "factbound" issues of the nature of the seizure, the characteristics and conduct of the citizens, and the risks presented by the citizens and the officers would be reviewed on ostensibly "legal" grounds. If this view were to prevail, numerous cases that ought to be evaluated by the diverse American jury pool living near to the original events will instead by resolved by a few judges drawn overwhelmingly from this nation's top universities, far removed from the facts in time and space, on a cold record. The Seventh Amendment demands better than that. Where facts are in dispute, summary judgment should be denied and interlocutory appeals barred, so that victims of police abuse may receive their constitutionally guaranteed jury verdict.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals and remand the matter for trial before the District Court.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN - 6 2014
OFFICE OF THE CLERK

No. 12-1117

In the Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

v.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AMICUS BRIEF OF THE STATE OF OHIO AND 21 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The petition for certiorari in this case lists the following two questions:

In a civil case against police officers for excessive force, a court must grant qualified immunity unless the use of force was prohibited by clearly established law. Here, the Sixth Circuit denied qualified immunity for force used in 2004 to end a vehicular pursuit that is similar to the force ruled permissible in *Scott v. Harris*, 550 U.S. 372 (2007). The Sixth Circuit denied qualified immunity by distinguishing *Scott* "in the details" from the force used three years earlier in this case. (Pet. App. at 8-9.) The Sixth Circuit applied a similar analysis in *Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011), where it also distinguished *Scott* to deny qualified immunity for pre-2007 conduct. As Judge McKeague noted in his extended dissent, the Sixth Circuit stands alone in this analysis. *Id.* at 504-11 (McKeague, J., dissenting). Petitioners believe this Court has an opportunity to correct the errors in the Sixth Circuit's qualified immunity analysis by agreeing to hear their case. The specific questions presented are as follows:

1. Whether the Sixth Circuit wrongly denied qualified immunity to Petitioners by analyzing whether the force used in 2004 was distinguishable from factually similar force ruled permissible three years later in *Scott v. Harris*, 550 U.S. 372 (2007). Stated otherwise, the question presented is whether, for qualified immunity purposes, the Sixth Circuit erred in analyzing whether the force was supported by subsequent case decisions as opposed to prohibited by clearly established law at the time the force was used.

2. Whether the Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law when, under Respondent's own facts, the suspect led police officers on a high-speed pursuit that began in Arkansas and ended in Tennessee, the suspect weaved through traffic on an interstate at a high rate of speed and made contact with the police vehicles twice, and the suspect used his vehicle in a final attempt to escape after he was surrounded by police officers, nearly hitting at least one police officer in the process.

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STATEMENT OF *AMICI* INTEREST

The States filing this *amicus* brief have a substantial interest in ensuring that the lower courts properly apply this Court's qualified-immunity doctrine—which immunizes state officials from damages suits unless their conduct violates "clearly established" constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The States' officials routinely defend against a variety of lawsuits under 42 U.S.C. § 1983 alleging that the officials' actions violated federal constitutional law. These types of suits, the Court has recognized, "'can be peculiarly disruptive of effective government,'" *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow*, 457 U.S. at 817), by shrinking the "breathing room" necessary for state officials to make important governmental decisions in areas clouded with opaque legal rules, *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011). The *Amici* States seek to ensure that qualified immunity retains its vitality to prevent these negative effects on state government.

In particular, the *Amici* States ask the Court to clarify two recurring issues in qualified-immunity cases (one jurisdictional and one substantive), both of which are illustrated by the Sixth Circuit's decision below. *First*, the Sixth Circuit's contradictory orders—which originally dismissed the appeal for lack of jurisdiction, then reversed the dismissal on rehearing, and ultimately expressed uncertainty over the court's jurisdiction, Pet. App. 7, 11-12—show the continued confusion on the scope of appellate jurisdiction over qualified-immunity denials. An appellate right means little if it leaves state officials in the dark on when they can exercise the right. *Second*, the Sixth Circuit's holding—which rejected qualified

immunity based on the Fourth Amendment's general reasonableness test and on cases decided after the relevant events occurred here—shows a continued misunderstanding of the meaning of "clearly established" law. The right to fair notice underlying that legal standard means little if lower courts inconsistently apply it.

In short, the *Amici* States have an interest in the Court resolving the recurring jurisdictional and substantive issues implicated by this case in a manner that serves the important governmental purposes for which the Court established qualified immunity.

SUMMARY OF ARGUMENT

I.A. The Court has long allowed state officials to seek immediate appeals from denials of qualified immunity under the collateral-order doctrine. In *Johnson v. Jones*, 515 U.S. 304 (1995), however, the Court limited this appellate jurisdiction when those officials bring "evidence sufficiency" claims on appeal—i.e., claims disputing whether the district court properly found sufficient evidence for particular factual allegations. This case offers the Court an opportunity to provide much needed clarity over the scope of *Johnson*'s jurisdictional limits.

B. The Court should resolve this jurisdictional issue because the circuit courts have erratically applied *Johnson*. And their confusion about *Johnson*'s domain has only increased after *Scott v. Harris*, 550 U.S. 372 (2007), which rejected a district court's version of the disputed facts in the process of finding a police officer entitled to qualified immunity. *See id.* at 378-81. The decision below illustrates this ongo-

ing confusion. Even after briefing and argument, the Sixth Circuit remained unsure whether it should dismiss for lack of jurisdiction under *Johnson* or affirm under an "exception" to *Johnson*'s jurisdictional limits that it believed *Scott* had created. *See* Pet. App. 7-8, 11-12. Because this uncertainty touches a jurisdictional question that must be answered in the many cases in which it arises, the Court's clarification would benefit courts and litigants alike.

C. The Court should hold that *Johnson* sets a narrow, bright-line rule. It has no effect whatsoever on appellate jurisdiction over typical "clearly established" claims—e.g., claims challenging the district court's decision that the state officials' conduct violated clearly established law. In the course of resolving those claims, therefore, appellate courts have jurisdiction to depart from a district court's mistaken conclusions about which facts are genuinely disputed. Instead, *Johnson* should be read narrowly to limit appellate jurisdiction only over orders resolving pure evidence-sufficiency claims like the claims at issue in that case.

D. Applying that bright-line rule here, the Sixth Circuit had jurisdiction because Petitioners appealed an order resolving whether their conduct violated clearly established law. In the process of resolving this appeal, moreover, the Court has jurisdiction (as it did in *Scott*) to depart from the lower courts' rulings about which facts are genuinely disputed.

II. On the merits, the Sixth Circuit's decision committed two basic errors when it rejected qualified immunity on the ground that it could not "conclude

that the officers' conduct was reasonable as a matter of law." Pet. App. 10. *First*, the decision identifies the relevant law at perhaps the highest level of generality (the Fourth Amendment's "reasonableness" standard). To qualify as "clearly established," however, a right cannot be articulated at such a high level of generality, and instead must be sufficiently specific to provide state officials reasonable notice that their conduct violates the right. *Second*, the decision wrongly relies on cases decided years after the relevant events took place in this case. It thus overlooks that the applicable "clearly established" law must have existed at the time of the challenged conduct.

ARGUMENT

I. THE COURT HAS JURISDICTION TO DETERMINE THE DISPUTED FACTS WHEN RESOLVING WHETHER PETITIONERS VIOLATED CLEARLY ESTABLISHED LAW

This Court generally permits state officials to appeal the denial of qualified immunity, except when they challenge a district court's "evidence sufficiency" order—e.g., an order finding that the plaintiffs have supported their factual allegations with sufficient evidence on summary judgment. Because the circuit courts continue to struggle with the scope of this exception, the Court should clarify the issue. In doing so, it should hold that the Court's cases establish a bright-line rule limiting jurisdiction *only* over those pure evidence-sufficiency rulings. This jurisdictional limit, by contrast, simply does not apply if the state officials seek to appeal an order—like the one here—

finding that the officials' alleged conduct violated clearly established law.

A. The Court Has Long Allowed State Officials To Take Early Appeals From Denials Of Qualified Immunity

A circuit court usually has subject-matter jurisdiction only over a "final decision" that ends the litigation in the district court. *See* 28 U.S.C. § 1291. But, under the collateral-order doctrine adopted in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), some orders qualify as "final" and immediately appealable, "even though the district court may have entered those orders before (perhaps long before) the case has ended." *Johnson v. Jones*, 515 U.S. 304, 310 (1995). To fall within this small class of appealable orders, "'the order must [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) (citation omitted). The Court has long permitted state officials to invoke this collateral-order doctrine and to immediately appeal many, but not all, orders denying qualified immunity.

The General Rule. In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court held that a district court's qualified-immunity denial meets the three necessary factors for falling within the collateral-order doctrine. *See id.* at 525-30. The third factor is the most obvious in this context. "Qualified immunity is 'an *immunity from suit* rather than a mere defense to

liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007) (citation omitted). In other words, if officials could not appeal qualified-immunity denials until after a final judgment, they would have to proceed through the very burdensome process that the doctrine is meant to avoid, making any post-judgment appeal of that denial effectively useless. *See id.*

As for the first factor, a qualified-immunity denial "conclusively" resolves whether such immunity should serve its purpose in the case at hand. *See Mitchell*, 472 U.S. at 527. When a district court rules that "the defendant is not immune" under "the facts . . . as asserted by the plaintiff," the court's "denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations." *Id.* At that point, officials can do nothing more to avoid the burdens that qualified immunity seeks to prevent.

As for the second factor, the qualified-immunity question is separate from the merits of the plaintiff's claim. *See id.* at 528-29. The former focuses on whether the plaintiff asserts a constitutional right that was "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The latter focuses on whether the official's conduct even violates the Constitution to begin with. *See Pearson v. Callahan*, 555 U.S. 223, 232 (2009); *Mitchell*, 472 U.S. at 529 n.10.

Since *Mitchell*, the Court has authorized immediate appeals for a wide array of qualified-immunity denials. The "typical[]" appealable order decides a "clearly established" claim; that is, it finds that "the federal right allegedly infringed was 'clearly established'" when the state official acted. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). But appellate jurisdiction has never been "strictly confined" to these types of claims. *Ashcroft v. Iqbal*, 556 U.S. 662, 673 (2009). Jurisdiction also exists, for example, over "the question whether the facts pleaded" in a complaint are sufficient to make out a violation of clearly established law. *Id.* Likewise, circuit courts have jurisdiction to consider the legal elements that a plaintiff must establish to prove a particular constitutional claim, *see Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006), or to assess whether a particular claim even exists at all, *see Wilkie v. Robbins*, 551 U.S. 537, 549 n.4 (2007).

Also since *Mitchell*, the Court has provided procedural guidance over how to handle appeals at the summary-judgment stage. In *Behrens*, the Court held that appellate courts may then reconsider their earlier qualified-immunity denials at the pleading stage, allowing state officials to take two appeals before trial. *See* 516 U.S. at 305-11. And, if a district court's summary-judgment denial does not identify its view of the disputed facts, *Behrens* holds, appellate courts may "'undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'" *Id.* at 313 (quoting *Johnson*, 515 U.S. at 319). In *Scott*, the Court held that, even

when a district court finds that sufficient evidence supports a plaintiff's particular factual allegation, an appellate court may reject the allegation if it "is blatantly contradicted by the record, so that no reasonable jury could believe it." 550 U.S. at 380.

The Exception. Only once, in *Johnson*, has the Court found appellate jurisdiction lacking over the denial of qualified immunity. In that case, the plaintiff alleged that five officers had beaten him, thereby violating his Fourth Amendment right to be free from excessive force. *Johnson*, 515 U.S. at 307. Three officers sought summary judgment on the ground that the plaintiff lacked evidence that they participated in, or even witnessed, the alleged beating. *Id.* The district court found a genuine dispute of material fact with respect to this issue. *Id.* at 308. The officers appealed, arguing that the district court "was wrong because the record contained 'not a scintilla of evidence . . . that one or more' of them had 'ever struck, punched or kicked the plaintiff, or ever observed anyone doing so.'" *Id.* (citation omitted).

This Court held that the circuit court lacked jurisdiction over this order because it "determine[d] only a question of 'evidence sufficiency,' *i.e.*, which facts a party may, or may not, prove at trial." *Id.* at 313. This type of order did not create a "final decision" under § 1291, the Court reasoned, because it did not involve the type of claim at issue in *Mitchell*—namely, a claim asking the appellate court to apply "'clearly established' law to a given (for appellate purposes undisputed) set of facts." *Id.* Instead, the Court held that where "a defendant simply wants

to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial," the question is not "separate" from the ultimate merits question under the collateral-order doctrine. *Id.* at 314. The Court also supported this result with practical considerations, including the relative expertise of trial judges versus appellate judges in determining the genuinely disputed facts, the burdens imposed on appellate courts in sifting through the evidentiary record, and the greater likelihood that the same evidentiary issues would repeat themselves after trial. *Id.* at 315-17.

B. The Circuit Courts Have Inconsistently Applied *Johnson*'s Jurisdictional Limits

As Judge Sutton recently commented, courts have spilled much ink trying to distinguish qualified-immunity appeals jurisdictionally allowed by *Mitchell* from qualified-immunity appeals jurisdictionally barred by *Johnson*. *See Romo v. Largen*, 723 F.3d 670, 686 (6th Cir. 2013) (Sutton, J., concurring) (identifying "intra-circuit conflicts"); *see also* 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.10, at 533 (Supp. 2013) (noting that *Johnson*'s "seemingly clear rule has encountered great difficulty in practice"). Disagreement and inconsistency existed immediately after *Johnson*. *Compare Winfield v. Bass*, 106 F.3d 525, 535-40 (4th Cir. 1997) (Wilkinson, J., concurring), *with id.* at 542-47 (Phillips, J., dissenting) (debating scope of *Johnson*). And *Scott* has only exacerbated this disagreement and inconsistency. *Compare George v.*

Morris, 736 F.3d 829, 835 (9th Cir. 2013), *with id.* at 849 (Trott, J., dissenting) (debating scope of *Scott*).

1. Soon after *Johnson*, courts diverged over its proper scope. The Eleventh Circuit reads *Johnson* as creating a bright-line rule that narrowly bars pure evidence-sufficiency claims in which state officials argue *only* that the district court wrongly identified disputed facts. *See Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir. 1996). If, by contrast, officials argue that their conduct does not violate clearly established law, *Johnson* does "not affect [the court's] authority to decide, in the course of deciding the interlocutory appeal, those evidentiary sufficiency issues that are part and parcel of the core qualified immunity issues, *i.e.*, the legal issues." *Id.* at 1486; *see also Kesinger ex rel. Estate of Kesinger v. Herrington*, 381 F.3d 1243, 1247-50 (11th Cir. 2004); *Johnson v. Clifton*, 74 F.3d 1087, 1091 (11th Cir. 1996). Rather, in resolving these "clearly established" claims, *Johnson* merely gives appellate courts "discretion to accept the district court's findings [concerning the disputed facts], if they are adequate." *Cottrell*, 85 F.3d at 1486.

Most other courts follow vaguer rules. Rejecting this *claim-specific* test for jurisdiction, these courts instead interpret *Johnson* as setting a *fact-specific* test. Even in the process of resolving clearly established claims, therefore, these courts hold that they lack jurisdiction to determine whether a district court "properly" identified disputed facts. *George*, 736 F.3d at 835. In other words, "where the district court makes a legal finding [on the clearly estab-

lished law] and states specific facts upon which that finding is based," these courts do "not have jurisdiction to delve behind the ruling and review the record to determine if the district court correctly interpreted those facts to find a genuine dispute." *Armijo ex rel. Chavez v. Wagon Mound Pub. Schs.*, 159 F.3d 1253, 1259 (10th Cir. 1998); *see also, e.g.*, *Via v. LaGrand*, 469 F.3d 618, 625 (7th Cir. 2006) (noting that the court "may only consider whether the defendant is entitled to qualified immunity given the factual disputes found by the district court"); *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (noting that the court must accept "the facts that the district court found sufficiently supported in the summary judgment record"); *Walker v. Horn*, 286 F.3d 705, 710 (3d Cir. 2002) (noting that "[w]e must adopt the facts assumed by the District Court").

This fact-based test, by necessity, creates a functional approach to jurisdiction. "Even if [state officials] frame[] an issue in terms of' a clearly established claim, the courts look through that claim to "determine whether [they are] simply arguing that the plaintiff offered insufficient evidence to create a material issue of fact." *White v. McKinley*, 519 F.3d 806, 813 (8th Cir. 2008). Each and every factual statement in an appellate brief thus triggers a jurisdictional inquiry. If the officials' brief—when asserting a "clearly established" claim—makes a factual statement inconsistent with the district court's fact assessment, appellate courts lack jurisdiction to consider that statement. *See, e.g.*, *Gutierrez v. Kermon*, 722 F.3d 1003, 1009-11 (7th Cir. 2013). If the courts can resolve the claim by "simply ignor[ing]" the

statement, they may do so, "'obviating the need to dismiss the entire appeal for lack of jurisdiction.'" *Kirby v. Duva*, 530 F.3d 475, 481 (6th Cir. 2008) (citation omitted). If, by contrast, the "argument on appeal depends upon and is inseparable from disputed facts," the courts must dismiss the entire appeal, including the clearly established claim, for lack of jurisdiction. *See Gutierrez*, 722 F.3d at 1011, 1014.

Under this fact-based approach, moreover, appellate courts must follow a district court's recitation of the facts, "even if [they] perceive[] an error in the district court's reading of the summary judgment record." *Via*, 469 F.3d at 623. Thus, courts have dismissed for lack of jurisdiction even when the district court's finding of a genuinely disputed fact rested on "the rankest type of inadmissible hearsay," *Ellis v. Wash. Cnty.*, 198 F.3d 225, 229 (6th Cir. 1999), or on expert opinions containing "numerous problems," *McKinney v. Duplain*, 463 F.3d 679, 691 (7th Cir. 2006). The courts even recognize that this rule can "problematically prolong th[e] case." *Id.*

But not always. Complicating matters further, the courts have adopted an exception to this exception to jurisdiction. Based on *Behrens*, the courts recognize that the bar on their record review does not apply if "the district court does not identify those factual issues as to which it believes genuine disputes remain." *Colston v. Barnhart*, 146 F.3d 282, 285 (5th Cir. 1998); *see also, e.g.*, *Via*, 469 F.3d at 625 n.3; *Doe ex rel. Doe v. City of Roseville*, 296 F.3d 431, 437-38 (6th Cir. 2002). But this second-level exception is just as vague as the *Johnson* exception it-

self, creating uncertainty over how much detail a district court must recite to trigger *Johnson*'s jurisdictional limits. *See Colston*, 146 F.3d at 285 ("We believe it unwise to attempt to articulate a test for the degree of specificity with which a district court must identify genuine issues of fact for these purposes."); *see also, e.g.*, *Krout v. Goemmer*, 583 F.3d 557, 564 (8th Cir. 2009) (finding jurisdiction to consider the record "to resolve *some* aspects of the appeals" (emphasis added)); *Armijo*, 159 F.3d at 1260 (finding record review barred for two alleged facts but not others because the district court "did not identify any other specific facts"); *Winfield*, 106 F.3d at 535 (holding that this second-level exception applies when a "district court fails to set forth *fully* the factual basis" for its conclusion (emphasis added)).

Not surprisingly given this fact-bound jurisdictional test, inconsistency has marred its application. *See Romo*, 723 F.3d at 687 (Sutton, J., concurring) (suggesting that it "happens more often than not" that the courts simply ignore this jurisdictional question). Indeed, as a well-known treatise approvingly notes, a "growing number of decisions in fact provide review of summary-judgment rulings . . . as to the showing whether there is a genuine issue" of fact. 15A C. Wright, Federal Practice § 3914.10, at 533 (Supp. 2013) (citing cases). In many cases, the court simply "gloss[es] over" this issue, despite its jurisdictional pedigree. *Id.* at 534; *see, e.g.*, *Brown v. Callahan*, 623 F.3d 249, 253-57 (5th Cir. 2010); *Demoret v. Zegarelli*, 451 F.3d 140, 148, 150 (2d Cir. 2006). In others, the court pays lip service to its jurisdictional rule but goes on to note its "disagreement with the

district court" over whether the record evidence shows "a genuine issue of material fact" on a particular factual issue. *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 403, 405 (6th Cir. 2007).

2. *Scott* has only added to the confusion on this jurisdictional issue. On one end of the spectrum, the Eleventh Circuit continues to follow its bright-line reading of *Johnson*, rejecting mistaken conclusions regarding the disputed facts when determining whether state officials violated clearly established law. *See, e.g., Johnson v. Niehus*, 491 F. App'x 945, 949-53 (11th Cir. 2012). On the other, the Ninth Circuit discounts *Scott* altogether on this question, noting that it did not cite *Johnson* or discuss the limits of appellate jurisdiction. *See George*, 736 F.3d at 835-36.

Other courts fall between these extremes. They take a narrow view of *Scott*, holding that it creates another "exception" to their broad reading of *Johnson*. *Romo*, 723 F.3d at 675. Specifically, they reason that *Scott*'s "scenario"—where a district court's findings are blatantly contradicted by the record—"represent[s] the outer limit of the principle of *Johnson*." *Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (3d Cir. 2007). If "the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false," the courts hold, "a court of appeals may say so, even on interlocutory review." *Id.*; *see also Williams v. Herron*, 687 F.3d 971, 975 (8th Cir. 2012) (noting that the court "must take as true those facts the district court found . . . , so long as those facts are not blatantly contradicted by the

record"); *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010) (same).

C. The Court Should Now Hold That *Johnson* Sets A Narrow, Bright-Line Rule

The Court should take the opportunity to resolve this jurisdictional morass, considering that the decision below itself could not decide whether it should dismiss for lack of jurisdiction. *See* Pét. App. 12; *see also Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (noting that "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists"). When doing so, the Court should interpret *Johnson*, like the Eleventh Circuit, to create a bright-line jurisdictional rule. On the one hand, *Johnson* bars interlocutory appellate jurisdiction when state officials assert an "evidence sufficiency" claim on appeal—i.e., they claim merely that the district court wrongly assessed "which facts [the plaintiff] may, or may not, be able to prove at trial." 515 U.S. at 313; *see Cottrell*, 85 F.3d at 1485-86.

On the other hand, *Johnson* in no way affects appellate jurisdiction whenever state officials assert the more typical clearly established claim—i.e., they claim that the district court wrongly held that clearly established law prohibited their conduct. *See Behrens*, 516 U.S. at 313. Thus, when appellate courts resolve these jurisdictionally proper clearly established claims, *Johnson* does not prohibit those courts from determining which of the plaintiff's factual allegations must and must not be accepted under Fed. R. Civ. P. 56. *See Scott*, 550 U.S. at 378-81. Nor does *Johnson* jurisdictionally prohibit those courts

from departing from a district court's conclusion that sufficient evidence supports a particular allegation when the record illustrates the contrary. *Id.* at 380-81; *see Cottrell*, 85 F.3d at 1486.

In short, *Johnson*'s jurisdictional limit depends on the type of claim that the state officials raise on appeal. It applies only when the officials assert as their ground for reversal that the district court wrongly determined the disputed facts. It does not apply when the officials assert that the district court wrongly held that their conduct violated clearly established law. And, in the process of resolving that legal claim, appellate courts have jurisdiction to consider any subsidiary evidentiary issues.

Both precedent and logic support this result.

1. The Court's cases are best read to treat *Johnson* as establishing a bright-line rule

a. The Court's cases on this question, when considered together, are best read to support the Eleventh Circuit's view that *Johnson* prohibits jurisdiction only over pure "evidence sufficiency" claims. *Johnson* itself reasonably can be interpreted to create that bright-line rule. The Court emphasized that the claim there raised "*only* a question of 'evidence sufficiency'" about whether the district court had properly assessed the facts. 515 U.S. at 313 (emphasis added); *see also id.* at 308 (noting that the officials argued that the summary-judgment "denial was wrong because the record contained 'not a scintilla of evidence . . . that one or more' of them had 'ever struck, punched or kicked the plaintiff, or ever ob-

served anyone doing so'" (citation omitted)). And the Court held that *Cohen*'s "theory of appealability" is not met "in the context of [this] 'evidence sufficiency' *claim*." *Id.* at 314 (emphasis added). Where the "defendant *simply* wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact," the Court reasoned, the appellate question is inseparable from the question on the merits. *Id.* (emphasis added). Finally, the Court expressly contrasted this type of claim with a "clearly established" claim, noting that "if the District Court in this case had determined that beating respondent violated clearly established law, petitioners could have sought review of *that* determination." *Id.* at 318.

Behrens provides further support for this bright-line rule. There, the Court rejected the argument that it lacked jurisdiction under *Johnson* because the district court's order had found material issues of fact. *See* 516 U.S. at 312. When doing so, the Court noted that summary-judgment denials, by definition, rest on conclusions that factual issues mandate a trial. But "*Johnson* surely does not mean that *every* such denial . . . is nonappealable." *Id.* at 313. If so, *Johnson* would have overruled *Mitchell*. Instead, as *Behrens* confirms, *Johnson* holds only that the evidence-sufficiency claims made in nearly every case are "not immediately appealable merely because they happen to arise in a qualified-immunity case." *Id.* Conversely, summary-judgment orders "*are* appealable" if they resolve "whether the federal right allegedly infringed was 'clearly established.'" *Id.* *Behrens*, moreover, made clear that the circuit court on

remand—when considering such a "clearly established" claim—had jurisdiction to review "'the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed.'" *Id.* (quoting *Johnson*, 515 U.S. at 319). It did so because the district court had not made any express findings about the genuinely disputed facts. *Id.*

Scott takes *Behrens* a step further. It shows that appellate courts, in the process of resolving clearly established claims, have jurisdiction to determine that a plaintiff lacks sufficient evidence for a particular allegation *even when* the district court has found a genuine factual dispute over that allegation. There, the district court had concluded that the plaintiff—who brought an excessive-force claim against the officer who rammed him during a high-speed chase—presented sufficient evidence to show that he had not "posed an immediate threat to the safety of others." *Harris v. Coweta Cnty.*, No. 3:01-cv-148, 2003 WL 25419527, at *5 (N.D. Ga. Sept. 25, 2003). This Court rejected that ruling, holding that the court of appeals should have concluded that a videotape supported only the finding that the plaintiff "was driving in such fashion to endanger human life." *Scott*, 550 U.S. at 380-81. Thus, *Scott* removes all doubt *both* that an appellate court has jurisdiction over clearly established claims *and* that it can depart from a lower court's sufficiency findings in the process of resolving those claims. *See* 15A C. Wright, Federal Practice § 3914.10, at 534 (Supp. 2013) ("Surely this decision amounted to a record-based re-

view of the question whether there was a genuine issue of material fact.").

b. The circuit courts that have adopted a fact-based reading of *Johnson*, by contrast, must create artificial distinctions between the Court's cases.

Take their distinction of *Scott*. The Ninth Circuit suggests that *Scott* has nothing to say on this question because it did not cite *Johnson*. *See George*, 736 F.3d at 835-36. But *Scott* recognized that appellate jurisdiction in that case turned on the collateral-order doctrine. *See* 550 U.S. at 376 n.2 (quoting *Mitchell*, 472 U.S. at 526-27). And because *Johnson*'s scope implicates the subject-matter jurisdiction of the appellate courts, the *Scott* Court was "not free to pretermit the question." *Iqbal*, 556 U.S. at 671.

The other circuits' view of *Scott*—as creating yet another "exception" to their broad reading of *Johnson*, *Romo*, 723 F.3d at 675—fares no better. When resolving clearly established claims, these courts hold, *Scott* allows them to disregard a district court's sufficiency assessments "for *blatantly* contradicted facts." *Id.* (emphasis added). In plain English, they interpret *Scott* as establishing a "*really* wrong" test, *id.* at 679 (Sutton, J., concurring), one that triggers appellate jurisdiction when a circuit court finds that the district court's sufficiency analysis is not simply wrong but "blatantly" so, *Scott*, 550 U.S. at 380; *see Lewis*, 604 F.3d at 1225-26. This reading—resting, as it does, solely on this Court's use of adverbs—has little to commend it.

For one thing, this view of *Scott* ties an appellate court's subject-matter jurisdiction over a district

court's ruling on the genuinely disputed facts to its subjective views of that ruling's *merits*. Dating back to *Bell v. Hood*, 327 U.S. 678 (1946), however, the Court has endeavored to keep jurisdiction distinct from the merits. *See id.* at 682; *see also, e.g.*, *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869, 2876-77 (2010). It is unlikely that *Scott* would so cavalierly change course in this one context. Instead, it is much more reasonable to read *Scott* as recognizing that *Johnson* does not at all affect appellate jurisdiction over clearly established claims.

For another, the efficiency reasons justifying *Johnson*'s limits on appellate jurisdiction cannot justify this reading of *Scott*. *See Johnson*, 515 U.S. at 316 (expressing concern with requiring appellate courts to review "a vast pretrial record"). Both the bright-line rule and the circuits' fact-based rule promote these efficiency concerns in the same manner. *Both* bar appellate jurisdiction over pure evidence-sufficiency claims. And *both* require appellate record review over clearly established claims. The only difference turns on the standard that state officials must meet ("wrong" versus "really wrong") before appellate courts may reject sufficiency rulings in the process of resolving those claims. Accordingly, this reading of *Scott* merely puts another layer of complexity on top of an already complex jurisdictional inquiry without adding any countervailing efficiency benefits. *See Romo*, 723 F.3d at 679 (Sutton, J., concurring) ("If *Johnson* is designed to protect appellate courts from record review, how does a 'blatantly contradicted by the record' standard help?").

The problems do not end with *Scott*. These courts also interpret *Behrens* to establish an equally unusual dichotomy. They recognize that they *do* have jurisdiction to consider evidentiary issues if the district court's order denying qualified immunity does not adequately identify the facts that it found genuinely disputed. *See, e.g.*, *Colston*, 146 F.3d at 285. Yet it is strange to tie the scope of an appellate court's subject-matter jurisdiction to whether a district court's written opinion adequately details its views of the genuinely disputed facts. After all, district courts "generally do not write summary judgment opinions in this way." *Romo*, 723 F.3d at 681 (Sutton, J., concurring). And this jurisdictional dichotomy runs contrary to the principle that appellate courts "'review[] judgments, not statements in opinions.'" *Camreta v. Greene*, 131 S. Ct. 2020, 2030 (2011) (quoting *California v. Rooney*, 483 U.S. 307, 311 (1987)); *cf. Harrington v. Richter*, 131 S. Ct. 770, 784-85 (2011). Finally, it seems somewhat arbitrary (and unfair to parties on both sides of the issue across the range of cases) to link the scope of appellate jurisdiction to whether or not a district court makes "adequate" findings.

To be sure, *Johnson* notes that, when resolving clearly established claims, "court of appeals *can* simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." 515 U.S. at 319 (emphasis added). But there is a big difference between *can* and *must*. This language need not set a rigid, jurisdictional rule—as opposed to a discretionary rule allowing appellate courts to determine "the best use of

the opportunity presented by the appeal." 15A Wright, Federal Practice § 3914.10, at 534 (Supp. 2013); *see Cottrell*, 85 F.3d at 1486. Indeed, the latter reading comports with the Court's recent efforts to clarify the narrow domain of the term "jurisdiction." *See, e.g.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).

All told, the Court's cases in this area are best read to treat *Johnson*'s jurisdictional limit as a bright-line rule that applies only to pure evidence-sufficiency claims.

2. General principles further prove that *Johnson* should be read as establishing a bright-line jurisdictional rule

General principles confirm that the Court should interpret *Johnson*, like the Eleventh Circuit, to set a bright-line rule barring appellate jurisdiction *only* over pure evidence-sufficiency claims. That rule follows from: (1) general principles of subject-matter jurisdiction; (2) specific jurisdictional principles in the collateral-order context; (3) qualified immunity's underlying purposes; (4) qualified immunity's substantive test; and (5) the presumption against unnecessarily deciding constitutional questions.

Basic Jurisdictional Principles. "Jurisdictional rules should be as clear and mechanical as possible." *Helm v. Resolution Trust Corp.*, 18 F.3d 446, 447 (7th Cir. 1994) (citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988)). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their

claims, but which court is the right court . . . ." *Hertz*, 559 U.S. at 94. Conversely, "courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Id.*; *see also In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987) (Easterbrook, J.) ("The chief and often the only virtue of a jurisdictional rule is clarity.").

The bright-line rule promotes these goals. It generally allows appellate courts to assure themselves of jurisdiction merely by scanning the district court's order and the argument headers in the state officials' appellate brief. So long as the brief asserts an abstract legal claim (typically, that the district court erred by finding that clearly established law prohibited their conduct), appellate jurisdiction is secure. The court can then proceed to the merits of the qualified-immunity inquiry without wasting further energy on its jurisdiction. While formalistic, that is a virtue, not a vice, of a jurisdictional test. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980).

Now consider the other circuits' fact-based rule. Under their view, jurisdictional questions pervade the entire appeal. Even when state officials "frame" their appeal as a proper "clearly established" claim, the courts still must analyze jurisdiction with respect to each and every factual statement that the officials make. *See White*, 519 F.3d at 813. A jurisdictional question gets triggered whenever a factual assertion appears to contradict the district court's order. *See Gutierrez*, 722 F.3d at 1009-11.

To their credit, these courts recognize the difficulties with their approach. The Sixth Circuit, for ex-

ample, has conceded that its rule often does not permit it to "adequately assess [its] jurisdiction to hear interlocutory appeals on qualified immunity *until the appeal is fully briefed and argued.*" *Berryman v. Rieger*, 150 F.3d 561, 564 (6th Cir. 1998) (emphasis added). Other courts, too, note that their rule creates a "hazy line" between proper and improper appeals. *Gutierrez*, 722 F.3d at 1011; *see also Camilo-Robles v. Hoyos*, 151 F.3d 1, 8 (1st Cir. 1998) (noting that "the dividing line between appealable and non-appealable denials of summary judgment is blurred"); *Winfield*, 106 F.3d at 529 (noting that "application of [the rule] may prove to be more difficult"). These courts thus set the very "'sort of vague boundary that is to be avoided in the area of subject-matter jurisdiction wherever possible.'" *Hertz*, 559 U.S. at 94 (quoting *Sisson v. Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)).

Indeed, this case shows that these courts may sometimes *never* be able to determine their jurisdiction. Pet. App. 12. A motions panel initially granted Respondent's motion to dismiss for lack of jurisdiction. Pet. App. 7. But it reversed itself on rehearing. *Id.* Ultimately, after the merits were reached, the court threw up its hands on this question, concluding that "[w]hether we call it a dismissal for lack of jurisdiction or an affirmance of the denial of qualified immunity, the result is the same." Pet. App. 12; *but see Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998). A jurisdictional rule that cannot be resolved until after the merits—if at all—is, to put it mildly, not a good jurisdictional rule.

Collateral-Order Principles. Under the collateral-order doctrine, the Court does "not engage in an 'individualized jurisdictional inquiry'" in each case, instead focusing on "'the entire category to which a claim belongs.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (citations omitted). The Court has thus permitted immediate appeals for *general categories* of cases—even if the "factual complexities" in some of the cases within these categories make immediate appeal a waste of time. *Puerto Rico*, 506 U.S. at 147 (orders denying Eleventh Amendment immunity); *see also, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (orders denying absolute immunity); *Abney v. United States*, 431 U.S. 651, 662 & n.8 (1977) (orders rejecting double-jeopardy claims). And the Court has denied immediate appeals for other *general categories* of cases—even if "an immediate appeal might result in substantial savings of time and expense" in some of the cases within these categories. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (orders on *forum non conveniens*); *see also, e.g.*, *Mohawk*, 558 U.S. at 108-09 (orders on attorney-client privilege); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 884 (1994) (orders refusing to enforce settlement).

The bright-line rule respects this framework. It splits qualified-immunity appeals into discrete categories of claims—evidence-sufficiency claims (which are jurisdictionally improper) and clearly established claims (which are jurisdictionally proper). Even if some "clearly established" appeals contain "factual complexities" that make the appeals a poor investment, *Puerto Rico*, 506 U.S. at 147, that does not bar

jurisdiction in this context any more than in any other context. Conversely, even if some "evidence sufficiency" appeals could be quickly resolved—leading to "substantial savings of time and expense," *Van Cauwenberghe*, 486 U.S. at 529—appellate courts still lack jurisdiction over those appeals.

The fact-bound rule, by contrast, flunks this framework. Because it is fact-based rather than claim-based, a circuit court cannot simply look to the state officials' claim, but must analyze the factual arguments made in support. "[I]n each individual case," therefore, these courts "engage in ad hoc balancing" about whether the state officials' factual statements remain sufficiently loyal to the district court's order, a fact-specific approach that *Johnson* itself criticized. 515 U.S. at 315. This approach, in other words, comes close to improperly "reduc[ing] the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 439 (1985); *see Romo*, 723 F.3d at 683 (Sutton, J., concurring) (criticizing broad reading of *Johnson* because it turns "every case" into "a class of an appealable or non-appealable decision unto itself").

Qualified Immunity's Purposes. By restricting damages suits against state officials, qualified immunity "gives [those] officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (internal quotation marks omitted).

And because fear of the litigation process itself can deter state officials from taking necessary action, the doctrine provides an immunity from suit so as to make the "breathing room" real rather than theoretical. *See Anderson*, 483 U.S. at 646 n.6. Thus, the Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Davis v. Scherer*, 468 U.S. 183, 195 (1984) (noting that qualified immunity will work "only if unjustified lawsuits are quickly terminated").

These purposes point to the bright-line rule. By interpreting *Johnson* to set a *narrow* rule, it maximizes the chances for appellate courts to resolve immunity questions at "the earliest possible stage," *Hunter*, 502 U.S. at 227, allowing state officials to avoid costly, fact-intensive litigation in the trial court whenever possible. And by interpreting *Johnson* to set a *clear* rule, it ensures that state officials do not waste unnecessary resources on jurisdictional issues far afield from the merits of the qualified-immunity test or the plaintiff's constitutional claim.

The fact-bound rule merely frustrates these goals. Because it creates "hazy" lines, *Gutierrez*, 722 F.3d at 1011, it forces parties to suffer the "'costs of litigating [jurisdictional] questions and [the] delays attributable to resolving them.'" *Pearson*, 555 U.S. at 237 (citation omitted). The fact-bound test thus runs counter to the actual reason for interlocutory appeals. It risks more, not less, burdensome litigation, including, for example, a routine round of motions practice in the appellate court before even reaching

the qualified-immunity denial on appeal. *See, e.g.*, Pet. App. 7.

Qualified Immunity's Test. In the qualified-immunity context, "clearly established" law means law that would put a reasonable official on notice "that what he is doing violates" the Constitution. *Anderson*, 483 U.S. at 640. It is thus not enough for a plaintiff to identify a constitutional right "at a high level of generality." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). Rather, the asserted right must be "'particularized'" so that its "'contours'" would be "clear to a reasonable official" untrained in legal reasoning. *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012) (citation omitted). In other words, "this inquiry 'must be undertaken in light of the *specific context of the case*, not as a broad *general proposition*.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (citation omitted; emphases added).

The bright-line rule best fits this definition of "clearly established" law. That is because appellate courts cannot apply this definition to particular cases without taking a deep dive into the facts. *See* 15A Wright, Federal Practice § 3914.10, at 528-29 (Supp. 2013) (noting "the intense fact-dependency of the immunity determination"). As Judge Wilkinson put it, "[i]nescapably, [appellate courts] must say what the given facts are before [they] can determine whether or not certain given facts showed a violation of clearly established law." *Winfield*, 106 F.3d at 536 (Wilkinson, J., concurring) (internal quotation marks omitted). Because the test, by definition, requires appellate courts to consider the specific facts of each

case, the bright-line rule allows them to do so without worrying about their jurisdiction over each and every fact apparent to them on the record.

The fact-based rule, by contrast, merely hamstrings appellate courts when undertaking this fact-intensive inquiry. In many cases, it will prove difficult to tell whether a district court based its qualified-immunity denial on an "(unreviewable) factual inference[]" or on a "(reviewable) legal conclusion[]." *See Romo*, 723 F.3d at 685 (Sutton, J., concurring). In others, it will prove difficult to tell whether the denial turned on an (unreviewable) finding of a "genuine" factual dispute or on a (reviewable) finding that an undisputed fact was "material." *See Winfield*, 106 F.3d at 538 (Wilkinson, J., concurring) (noting that the dissent overlooked this distinction).

Iqbal further illustrates this basic point. There, the plaintiff argued that *Johnson* barred appellate jurisdiction over a district court's holding that a complaint alleged enough factual details to state a claim that high-level officials had engaged in discrimination. *See* 556 U.S. at 669, 671. The Court disagreed. Whether "a particular complaint sufficiently alleges a clearly established violation of law," the Court reasoned, "cannot be decided *in isolation from the facts pleaded*." *Id.* at 673 (emphasis added). But that is equally true at the summary-judgment stage. *See Lewis*, 604 F.3d at 1226 n.2. The only difference is that the court no longer looks to "the defendant's conduct *as alleged in the complaint*," but to the defendant's conduct *as shown by the evidence*. *Behrens*, 516 U.S. at 309. At either stage, an appel-

late court cannot answer the "clearly established" question without digging into the facts that have been "alleged" or "shown." *Pearson*, 555 U.S. at 232.

Constitutional Avoidance. Finally, this Court has traditionally expressed reluctance about unnecessarily answering difficult constitutional questions if an easier avenue exists for resolving the case. *See id.* at 235. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [the Court] ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). Indeed, the Court relied on this presumption when holding that lower courts should have flexibility to resolve the "clearly established" prong of the qualified-immunity test without ever determining whether a constitutional violation occurred at all. *See Pearson*, 555 U.S. at 241.

This traditional canon equally supports the bright-line rule. In some cases, a mistaken sufficiency-of-the-evidence finding could turn what otherwise would be a straightforward constitutional question into a much closer one. If an appellate court may immediately correct the sufficiency finding when resolving the appeal, it could allow for an easier avenue to decide the case without wading into difficult questions about whether a clearly established constitutional right existed. *Cf. Lewis*, 604 F.3d at 1226 n.2 (recognizing that courts generally "decline to opine on the legal consequences of factual scenarios that [they] would hold implausible as a matter of law

because doing so risks offering advisory opinions"). In other words, a flexible approach—rather than a "rigid order of battle"—makes as much sense here as it does elsewhere. *See Pearson*, 555 U.S. at 234; *cf. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007).

* * * *

One final issue deserves brief mention. It might be argued that the bright-line rule turns *Johnson* into a lawyer's game, one that risks abusive appeals that ostensibly raise "clearly established" claims but that merely disguise a refusal to accept disputed facts. But these risks exist however *Johnson* is interpreted—as the Court itself seemed to note. *See* 515 U.S. at 318; *see also Romo*, 723 F.3d at 685 (Sutton, J., concurring) (noting that the "distinctions and complexities" from a broad reading of *Johnson* merely "increase the odds that appellate jurisdiction will turn on the quality of the lawyer"). Further, "'[i]t is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims.'" *Behrens*, 516 U.S. at 310 (quoting *Abney*, 431 U.S. at 662 n.8). The only difference between the jurisdictional rules concerns the label that a court should place on the summary disposition—whether a summary dismissal for lack of jurisdiction (under the fact-bound rule) or a summary affirmance on the merits of the qualified-immunity question (under the bright-line rule). If anything, the latter offers more, not less, deterrent value for abusive appeals, as it could have binding effect throughout the remainder of the suit. *See*

United States v. Hatter, 532 U.S. 557, 566 (2001) ("The law of the case doctrine presumes a hearing on the merits.").

In sum, the Court should provide much needed clarity on this jurisdictional issue with a clear rule: Appellate courts have jurisdiction so long as (1) a district court denies qualified immunity on the ground that clearly established law prohibited a state official's conduct and (2) the official's appellate claim challenges that legal holding.

D. Applying This Rule Here, The Court Has Jurisdiction And Need Not Defer To The District Court's Recitation Of The Record

Under this rule, there can be no doubt that the Sixth Circuit and this Court have jurisdiction over Petitioners' appeal. The district court resolved the purely legal question whether their conduct violated clearly established law at the time they took the challenged actions. Pet. App. 41-42. On appeal, Petitioners challenged the district court's qualified-immunity denial on, among others, the ground that the law was not clearly established when they acted. *See* Defendants-Appellants' Br. at 15-23. These facts secure appellate jurisdiction.

Further, when resolving whether Petitioners' conduct violated clearly established law, the Court's jurisdiction does not require it to defer to the district court's recitation of the facts. Instead, it has jurisdiction to depart from the district court's analysis concerning which facts are genuinely disputed. *See Scott*, 550 U.S. at 378-81.

II. WHATEVER THE FACTS, THE SIXTH CIRCUIT ERRED IN DETERMINING THE "CLEARLY ESTABLISHED" LAW

This case also gives the Court an opportunity to reaffirm the meaning of "clearly established" law. As Petitioners explain in detail, the decision below contains two flaws on the merits—one analytical, one temporal. Analytically, the Sixth Circuit defined "clearly established" law at too high a level of generality, rather than with the detail that would helpfully guide state officials. Temporally, the Sixth Circuit relied on cases that had not even been decided at the time the officials acted. These errors, if they were to become the norm, would hamper state officials' dual efforts to protect the public and respect civil liberties.

The Analytical Problem. The Sixth Circuit denied immunity at this stage because it could not "conclude that the officers' conduct was reasonable as a matter of law." Pet. App. 10. The court's ambiguous use of the word "reasonable" admits of two readings. It could mean that the officers' use of force was "unreasonable" under the Fourth Amendment. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989). Or it could mean that the officers did not deserve qualified immunity because their conduct violated clearly established law "of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. Either interpretation contains a qualified-immunity error.

The first reading collapses the question whether the state officials violated the claimant's constitutional rights and the question whether those constitutional rights were clearly established. The Court

has acknowledged that treating the issues as one question may have "surface appeal" in the Fourth Amendment context, given the oddity of saying an officer "'reasonably' acted unreasonably." *Anderson*, 483 U.S. at 643. But the familiar two-step of qualified immunity applies "'across the board.'" *Id.* at 642 (citation omitted). And (if the first reading is right) the Sixth Circuit failed to separate the constitutional inquiry from the immunity inquiry here "just as it [sh]ould for any other claim of official misconduct." *Saucier v. Katz*, 533 U.S. 194, 203 (2001).

The second reading violates this Court's repeated direction to examine the relevant legal rule at a specific enough "level of generality" to ensure the "contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 639-40; *see also al-Kidd*, 131 S. Ct. at 2084; *Saucier*, 533 U.S. at 202; *Wilson v. Layne*, 526 U.S. 603, 615 (1999). If this second reading is correct, the Sixth Circuit answered the immunity question—was "the officers' conduct . . . reasonable as a matter of law," Pet. App. 10—at the level of the Fourth Amendment's text. *See al-Kidd*, 131 S. Ct. at 2084 ("The general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."). It is hard to imagine a more abstract definition of the claimed right, and equally hard to imagine a less helpful guidepost for state officials. Whether the Sixth Circuit intended the first reading or the second, its holding that it could not "conclude that the officers' con-

duct was reasonable as a matter of law" fundamentally misapprehends how qualified immunity works.

The Temporal Problem. The Sixth Circuit also failed to cite any binding cases existing at the time of the conduct in question here. The reasonableness of an official's action must be "assessed in light of the legal rules that were 'clearly established' *at the time it was taken.*" *Anderson*, 483 U.S. at 639 (emphasis added). Yet the primary authority on which the Sixth Circuit relied—*Scott*—post-dated Petitioners' actions by nearly three years.

In its *entire* qualified-immunity analysis, moreover, the Sixth Circuit cited only one case pre-dating the events—a case granting qualified immunity and arising in a jurisdiction that did not bind the officials here. *See Adams v. St. Lucie Cnty. Sheriff's Dep't*, 998 F.2d 923, 923 (11th Cir. 1993) (adopting reasoning in *Adams v. St. Lucie Cnty. Sheriff's Dep't*, 962 F.2d 1563, 1573-79 (11th Cir. 1992) (Edmondson, J., dissenting)). That is a thin reed on which to hang personal liability, especially without considering cases from the Eighth Circuit (where the officers were stationed) or the Sixth (where the events occurred). Having identified no clearly established law existing at the time of the officers' conduct—indeed, having not even used the phrase "clearly established"—the Sixth Circuit erred in its application of the qualified-immunity test.

At day's end, these mistakes—defining clearly established law at a high level of generality and relying on cases decided after the challenged conduct—are not mere abstract errors. They have the real-world

potential to harm the States' efforts to protect their citizens. Qualified immunity's "breathing room" protects state officials, to be sure. *al-Kidd*, 131 S. Ct. at 2085. But more than that, it protects "the public interest" by ensuring that the officials' "action[s] [are] taken 'with independence and without fear of consequences'" in settings with unclear legal rules. *Harlow*, 457 U.S. at 819 (citing *Pierson v. Ray*, 386 U.S. 547, 554 (1967)).

CONCLUSION

The Court should hold that the Sixth Circuit had jurisdiction over Petitioners' appeal, but reverse the Sixth Circuit's decision on the merits.

Respectfully submitted,

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JANUARY 6, 2014